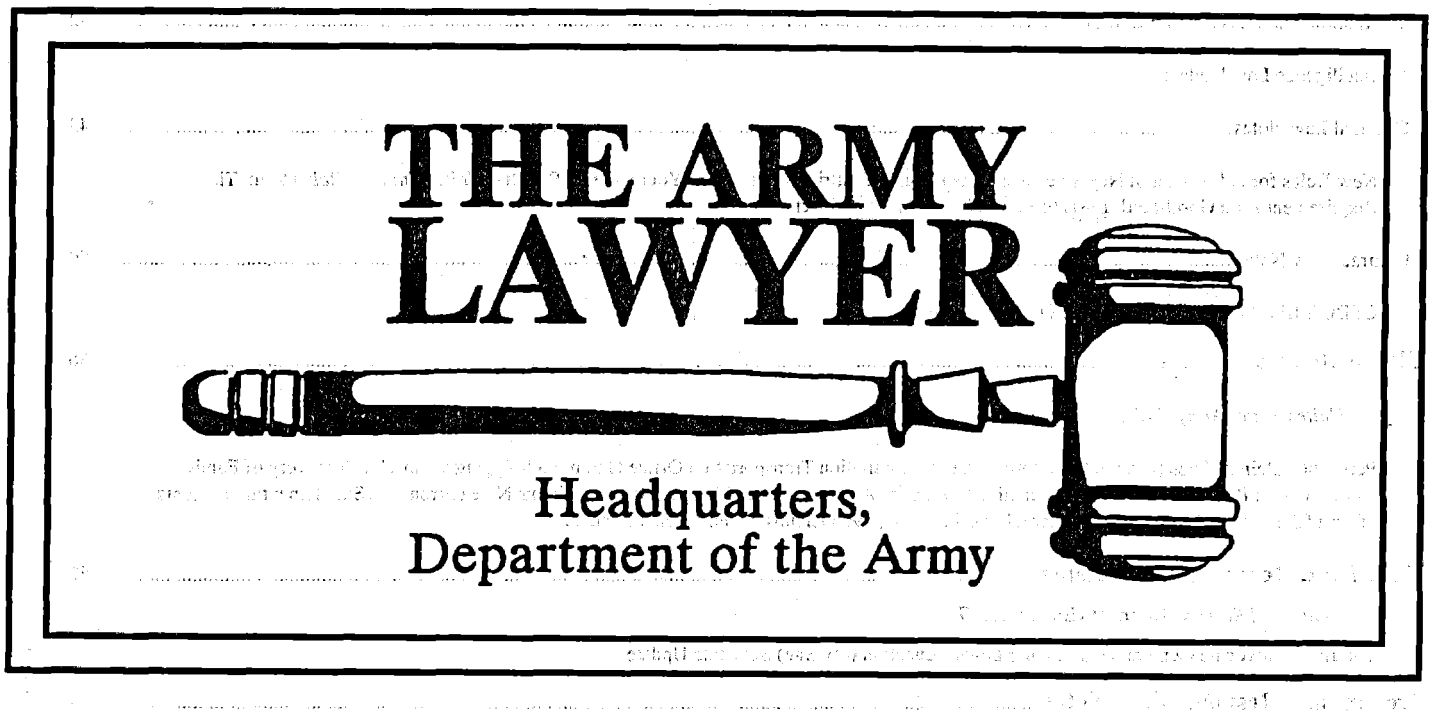

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Annual Review of Developments in Instructions

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Introduction

This article reviews significant instructional issues arising in the military criminal justice system in 1994.[1] It offers practical tips and insights for both military judges and counsel.

Most of the developments discussed in this article are based on case law and change 6 to the *Manual for Courts-Martial (Manual)*.[2] However, this article also will discuss instructional developments contained in updates to the *Military Judges' Benchbook (Benchbook)*[3] promulgated by the Office of the Chief Trial Judge, United States Army Trial Judiciary. During the past year, five such updates were issued. The most extensive of these updates completely revised the trial script contained in Chapter 2 of the *Benchbook*.[4] An updated checklist of *Benchbook* instructions, including new instructions contained in the updates, may be found at Appendix A of this article.

Instructions on Offenses

The military judge must instruct on the elements of the charged offenses. In *United States v. Valdez*,[5] the accused challenged the judge's instructions on the elements of unpremeditated murder. The prosecution charged that the accused murdered his daughter by not only actively participating in her physical abuse, but also by deliberately withholding medical attention. The accused contended that a conviction for unpremeditated murder could not be based, in whole or part, on omissions, rather than affirmative acts. Recognizing that Article 118(2) of the Uniform Code of Military Justice (UCMJ)[6] does not specify the nature of the conduct which can constitute a killing, the Court of Military Appeals (COMA)[7] reviewed the legislative history of Article 118 and the nature of murder at common law to conclude that "the military judge did not err in instructing the court members that a calculated withholding of medical attention, alone or in combination with physical abuse, plus a specific intent to inflict great bodily harm or to cause death, stated the essence of unpremeditated murder."[8]

In *United States v. Peszynski*,[9] a divided NMCMR found that the military judge's instructions failed to provide meaningful guidance to the court members concerning "sexual harassment" offenses alleged under Article 134.[10] The accused was charged with making repeated and unwelcome comments, gestures, and physical contact with female employees at his off-duty, part-time, on-base place of employment. In a bill of particulars, the trial counsel provided specific examples of the comments and gestures and indicated that

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[1] This article is one in a series of annual articles reviewing instructional issues. *See, e.g.*, Gary J. Holland & R. Peter Masterton, *Annual Review of Developments in Instructions*, ARMY LAW., Apr. 1994, at 3.

[2] MANUAL FOR COURTS-MARTIAL, United States (1984) (C6, 23 Dec. 1993) [hereinafter MCM]. Change 7 to the *Manual*, approved on 10 November 1994, did not contain any significant changes in the area of instructions. Exec. Order No. 12,936, 59 Fed. Reg. 59,075 (1994).

[3] DEP'T OF ARMY, PAMPHLET 27-9, MILITARY JUDGES' BENCHBOOK (1 May 1992) [hereinafter BENCHBOOK].

[4] Memorandum, U.S. Army Legal Services Agency, JALS-TJ, subject: U.S. Army Trial Judiciary Benchbook Update Memo 11 (19 July 1994) [hereinafter Update Memo 11].

[5] 40 M.J. 491 (C.M.A. 1994).

[6] UCMJ art. 118(2) (1988).

[7] On 5 October 1994, the National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2633 (1994), changed the name of the United States Court of Military Appeals to the United States Court of Appeals for the Armed Forces (CAAF). The same act also changed the names of the various Courts of Military Review to the Courts of Criminal Appeals. In this article, the title of the court that was in place at the time the decision was published will be used.

[8] *Valdez*, 40 M.J. at 495. In a similar case, United States v. Cowan, 39 M.J. 950 (N.M.C.M.R. 1994), the court members convicted the accused of involuntary manslaughter in violation of Article 119, UCMJ, after the judge gave somewhat inconsistent instructions as to whether the members had to find that the accused's stabbing or failure to provide timely assistance or both was the cause of the unlawful killing. In *Cowan*, the Navy-Marine Corps Court of Military Review (NMCMR) held that the inconsistent instructions were insignificant because the prosecution "unquestionably proved" that the stabbing occurred. *Id.* at 955.

[9] 40 M.J. 874 (N.M.C.M.R. 1994).

[10] UCMJ art. 134 (1988).

they were of a sexual nature.[11] The judge instructed the members that the offenses equated to "sexual harassment" and, besides giving the factual allegations in the specifications as elements, the judge defined "sexual harassment" as including "repeated or deliberate offensive comments or gestures of a sexual nature."[12] The NMCMR faulted the judge in not providing "meaningful legal principles for the court-martial's consideration"[13] by failing to provide any standards for the members to distinguish noncriminal conduct from criminal conduct. The accuracy of this assessment is questionable because the judge instructed the members that the comments had to be offensive and either prejudicial to good order and discipline or of a nature to bring discredit on the armed forces. Perhaps the only value *Peszynski* has for practitioners is that trial counsel must be specific in alleging criminal behavior to ensure that judges have a complete basis for formulating instructions.

While *Peszynski* involved a judge not giving enough instructions, another NMCMR case involved an allegation that the judge provided too much explanation in his instructions. In *United States v. Sneed*,[14] the accused was the evidence custodian for the military police at Camp Lejeune, North Carolina. He was convicted of wrongfully disposing of military property in his evidence room. One of the issues was whether the property—which included money, brass knuckles, a gym bag, caps, a bottle of cologne, and pornographic magazines—was "military" property. The judge instructed the members that they could, but were not required to, find that the items were military property if they were "surrendered to the military for use as evidence" and that "maintaining items of evidence is an indispensable part of the [military] court system."[15] The NMCMR found that the judge's expanded instructions did not invade the fact-finding role of the court members, but merely provided facts from which the members could, if they desired, infer other facts.[16]

In *United States v. Commander*,[17] the accused was a bodybuilder, who, knowing that military physicians would not prescribe anabolic steroids for a nonmedical reason, had a German physician prescribe steroids for him. At the court-martial for wrongful possession and use of the steroids, the military judge instructed the members that the accused's possession and use would be wrongful if the prescription was obtained by fraud or for other than legitimate medical purposes. The judge further explained in detail what a legitimate medical purpose was, in accordance with instructions that he had discussed with counsel and to which the defense counsel had no objections.

On appeal, the accused argued for the first time that a legitimate medical purpose is "any purpose for which a drug may be prescribed legally" and to be guilty of the offense, the act of prescribing the steroids also must be illegal.[18] The accused argued that prescribing steroids for bodybuilding was legal in Germany.[19] The Air Force Court of Military Review (AFCMR) found no error in the judge's instructions and also found that the defense counsel's affirmative acceptance of the judge's proposed instructions constituted waiver.[20] While the judge in *Commander* should be commended for providing meaningful guidance to the members, defense counsel also should note that to preserve instructional issues for appeal, they should be reluctant to agree to any instruction not fully in the best interests of the accused.

During 1994, the Office of the Chief Trial Judge, United States Army Trial Judiciary, published several updates to the *Benchbook* dealing with instructions on offenses. These

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[11] *Peszynski*, 40 M.J. at 876.

[12] *Id.* at 877.

[13] *Id.* at 882. *See also* United States v. Diaz, 39 M.J. 1114 (A.F.C.M.R. 1994) (setting aside a "harassment" offense under Article 134 because the judge did not define the terms "harass" or "harassment"). *Diaz* indicated that the judge must not only instruct on the elements, but must define any terms essential to an understanding of the elements. *Id.* at 1118-19.

[14] 39 M.J. 849 (N.M.C.M.R. 1994).

[15] *Id.* at 851.

[16] *Id.* at 851-52.

[17] 39 M.J. 972 (A.F.C.M.R. 1994).

[18] *Id.* at 978.

[19] At trial, a government physician testified that, although prescribing steroids for bodybuilding is not accepted as good medical practice in Germany, some German physicians are willing to do so. *Id.*

[20] *Id.* at 979. Failure to object to instructions before the court members close to deliberate constitutes waiver absent plain error. MCM, *supra* note 2, R.C.M. 920(f).

updates concerned the elements and definitions involved in attempts under Article 80, UCMJ,[21] drunken, impaired, or reckless operation of a vehicle, aircraft, or vessel under Article 111, UCMJ,[22] rape, carnal knowledge, and sodomy under Articles 120 and 125, UCMJ,[23] and solicitation[24] and adultery[25] under Article 134, UCMJ.[26] These update instructions are intended to ensure that military judges incorporate the latest statutory changes and case law into their instructions. However, even with these updates, blind adherence to the *Benchbook* instructions, without updating them in response to current law and tailoring them to the facts, may cause the military judge to fail in providing meaningful advice to the court members.

Lesser-Included Offense Instructions

In *United States v. Foster*,[27] one of its most significant decisions in 1994, the COMA adopted the "elements" test as the test for determining if one offense is a lesser-included offense of another. This is the same test that the COMA adopted in *United States v. Teters*[28] as the test for determining if offenses are multiplicious for findings purposes. Because of language that the COMA used in *Teters*, some practitioners and commentators foretold that the elements test also would be applied in the area of lesser-included offenses.[29] *Foster* was significant because it resolved this issue. However, the COMA may have added to the confusion by going beyond the elements test.

Technical Sergeant Foster was charged with forcible sodomy. The court convicted him by exceptions and substitutions of an indecent assault. The AFCMR held that indecent assault was not a lesser-included offense of forcible sodomy because indecent assault, unlike sodomy, requires that the victim not be the spouse of the accused. The AFCMR held, however, that a conviction of indecent acts with another could be sustained as a lesser-included offense of forcible sodomy.[30]

The COMA granted review of the AFCMR decision. After deciding to adopt the elements test, the COMA had to decide whether the additional element of prejudice to good order and discipline or service discrediting conduct, contained in the indecent acts offense under Article 134, UCMJ,[31] prevented it from being a lesser-included offense of sodomy under Article 125, UCMJ.[32] If so, any offense charged under the first two clauses of Article 134 could never be a lesser-included offense

[21] UCMJ art. 80 (1988); Memorandum, U.S. Army Legal Services Agency, JALS-TJ, subject: U.S. Army Trial Judiciary Benchbook Update Memo 9 (7 Jan. 1994) [hereinafter Update Memo 9]. The update instruction modified the definition of "more than mere preparation" in the elements to reflect that the requisite overt act(s) must be a substantial step and a direct movement toward the commission of the intended offense. *See* United States v. Schoof, 37 M.J. 96 (C.M.A. 1993); United States v. Byrd, 24 M.J. 286 (C.M.A. 1987).

[22] UCMJ art. 111 (Supp. V 1993); Memorandum, U.S. Army Legal Services Agency, JALS-TJ, subject: U.S. Army Trial Judiciary Benchbook Update Memo 10 (28 Feb. 1994) [hereinafter Memo 10]. The update instruction modified the elements and definitions to clearly define four separate offenses under Article 111: those situations where the accused (1) was drunk; (2) had a specific alcohol level; (3) was reckless or wanton; and (4) was impaired by a controlled substance. The update was promulgated in response to change 5 to the *Manual*, MCM, *supra* note 2 (C5, 15 Nov. 1991), and the 1992 and 1993 amendments to Article 111, UCMJ. Change 5 changed the definition of "operating" to clarify that it includes starting an engine, without moving the vehicle, aircraft, or vessel. The amendments to Article 111 completely revised the text of the article and added a prohibition on operating a vehicle, aircraft, or vessel with an alcohol concentration at or above .10 grams per milliliters of blood or .10 grams per 210 liters of breath.

[23] UCMJ art. 120 (1988 & Supp. V 1993); UCMJ art. 125 (1988); Memorandum, U.S. Army Legal Services Agency, JALS-TJ, subject: U.S. Army Trial Judiciary Benchbook Update Memo 12 (15 Aug. 1994) [hereinafter Update Memo 12]. The update instruction modified the elements to correspond to the 1992 amendment of Article 120, UCMJ, and to further define the concept of constructive force in the offenses. The 1992 amendment of Article 120 eliminated the requirements in the offense of rape that the victim be female and not the wife of the accused. Although rape still requires sexual intercourse between a male and a female, under the 1992 amendment it is possible for the perpetrator to be female and the victim to be male.

[24] Memorandum, U.S. Army Legal Services Agency, JALS-TJ, subject: U.S. Army Trial Judiciary Benchbook Update Memo 13 (23 Nov. 1994) [hereinafter Update Memo 13]. One main item changed by the update was the inclusion in the instruction that the person solicited must have known that the act solicited is part of a criminal venture. *See* United States v. Higgins, 40 M.J. 67 (C.M.A. 1994).

[25] Update Memo 10, *supra* note 22. The update added a definition of sexual intercourse and optional instructions on penetration and prejudice to good order and discipline or service discrediting conduct. *See* United States v. Perez, 33 M.J. 1050 (A.C.M.R. 1991).

[26] UCMJ art. 134 (1988).

[27] 40 M.J. 140 (C.M.A. 1994).

[28] 37 M.J. 370 (C.M.A. 1993), *cert. denied*, 114 S. Ct. 919 (1994). *Teters* states that in determining whether offenses are multiplicious, one need only compare the elements of the offenses: to be multiplicious, the elements of one offense must be a subset of the other's elements.

[29] *See, e.g.*, Gary J. Holland & Willis C. Hunter, United States v. Teters: *More Than Meets the Eye?*, ARMY LAW., Jan. 1994, at 16.

[30] *Foster*, 40 M.J. at 142.

[31] UCMJ art. 134 (1988).

[32] *Id.* art. 125 (1988).

of an offense charged under Articles 80 through 133, UCMJ,[33] which do not contain the prejudice to discipline or service discrediting element.

The COMA decided that this additional element did not prevent indecent acts from being a lesser-included offense of sodomy. It stated that "[t]he enumerated articles are rooted in the principle that such conduct *per se* is either prejudicial to good order and discipline or brings discredit to the armed forces; these elements are implicit in the enumerated articles."[34] The COMA held, therefore, that Article 134 offenses may be lesser-included offenses of the offenses enumerated in Articles 80 through 133.

Under the elements test, an offense is a lesser-included offense if all the elements of the "lesser" offense comprise a subset of the elements in the "greater" offense. However, practitioners may not do a literal, straight-line, quantitative comparison of the elements to determine if the elements of one offense are a subset of another. The COMA indicated that "subset elements can either be quantitatively or qualitatively lesser."[35] The COMA also stated that, when using the qualitative approach, the elements must be lined up realistically to determine whether each element of the lesser offense is "rationally derivative" of one or more elements of the greater offense.[36] In *Foster*, the COMA held that the first two elements of indecent acts (commission of a wrongful act and indecency of the act) were qualitatively included in the elements of forcible sodomy (unnatural carnal copulation by force and without the consent of the victim), thereby, making it a lesser-included offense. Whether the COMA actually has clarified what constitutes a lesser-included offense remains to be seen.[37] Qualitative comparisons leave much room for litigation.

In *Foster*, the COMA also questioned, without deciding, whether the lower court was correct when it held that indecent assault—with its additional element requiring the victim not be the spouse of the accused—was not a lesser-included offense to sodomy.[38] Of greater concern for counsel and judges may be the COMA's recent reference to the proposition that indecent assault is a lesser-included offense of rape.[39] Whether one looks at elements on a quantitative or a qualitative level, it would seem that the specific intent crime of indecent assault would not be a lesser offense to the general intent crime of rape.

At least the COMA has clarified whether an Article 134 offense can be a lesser-included offense of another substantive offense. By implementing a qualitative analysis rather than a strict quantitative analysis, however, the COMA has not provided an easy solution for determining lesser-included offenses. Furthermore, the COMA may have slipped back into applying a standard similar to the "fairly embraced" test, which it rejected in *Teters* in favor of the "elements" test.[40]

Instructions on Defenses

In 1994, the United States Army Trial Judiciary incorporated into the *Benchbook* a new instruction on the affirmative defense of self-help under a claim of right.[41] Although the *Manual* does not list this defense,[42] military courts recognize that, in some cases, self-help is an affirmative defense. The judge has a duty to instruct on the self-help defense when some evidence exists that the accused took, withheld, or obtained property under an honest belief that the accused was entitled to the property as the owner or as collateral for a debt owed to the accused.[43] Including the instruction in the *Bench-*

[33] *Id.* arts. 80-133 (1988).

[34] *Foster*, 40 M.J. at 143.

[35] *Id.* at 144.

[36] *Id.* at 146.

[37] Even the COMA indicated that "sound practice would dictate the prosecutors plead not only the principal offense, but also any analogous Article 134 offenses as alternatives." *Id.* at 143. If the Article 134 offense is truly a lesser-included offense, what need exists to allege it separately from the principal offense? If the offense is a lesser-included offense, the lesser offense should be dismissed prior to the trial on the merits as being multiplicious with the principal offense. If court members try the case, the suggested alternative charging potentially could prejudice the court members against the accused based on the increased number of charged offenses. The COMA's gratuitous statement illustrates an example of the appellate court doing little to assist trial judges and counsel, who must apply its ambiguous decisions in the courtroom.

[38] *Id.* at 145 n.5.

[39] United States v. Schoolfield, 40 M.J. 132, 137 n.7 (C.M.A. 1994) ("It is well established as a matter of law that indecent assault is a lesser-included offense of rape.").

[40] *See* Note, *One Step Forward, Two Steps Back: The Law of Lesser-Included Offenses After* United States v. Foster, ARMY LAW., Jan. 1995, at 50.

[41] Update Memo 13, *supra* note 24, para. 5-18.

[42] MCM, *supra* note 2, R.C.M. 916.

[43] *See, e.g.*, United States v. Birdsong, 40 M.J. 606 (A.C.M.R. 1994); United States v. Gunter, 37 M.J. 781 (A.C.M.R. 1993); United States v. Smith, 14 M.J. 68 (C.M.A. 1982).

book should make it more difficult for counsel and judges to overlook this defense.

A recent example of the self-help defense arose in *United States v. Birdsong*.[44] Specialist Birdsong was estranged from her military husband, but had custody of their daughter. Although Specialist Birdsong was entitled only to a portion of her husband's Basic Allowance for Quarters (BAQ) for supporting their child,[45] she testified that she believed that her husband owed her the entire amount of his BAQ and another $1500 arising from an unrelated debt. She was charged with forging allotment forms (directing that these amounts be deducted from her husband's pay) and larceny of the money which resulted from the forged allotments. The members convicted Specialist Birdsong of both the forgery and larceny offenses without the benefit of any instruction on the self-help defense; neither the judge nor counsel recognized the defense as being in issue. The Army Court of Military Review (ACMR) held that Specialist Birdsong's testimony was sufficient to suggest that she honestly believed that her husband owed her the money as repayment of a debt and as support payments owed her on behalf of their daughter.[46] The ACMR held that the military judge erred in not giving the instruction as to the larceny offense, but that self-help did not apply to the forgery offenses, as self-help will not excuse the use of fraud in inducing third parties to pay money from another's account.[47]

Another new instruction placed in the *Benchbook* covers those situations when the evidence tends to negate a necessary mens rea involved in an offense.[48] The *Manual* states that an accused may present evidence as to a mental disease or defect only if it amounts to a complete lack of mental responsibility.[49] This prohibition also applies to evidence relating to any requisite state of mind for any offense—such as specific intent, knowledge, premeditation, or willfulness.[50] However, the COMA has declared these provisions of the *Manual* invalid.[51] The new *Benchbook* instruction codifies the COMA's decision.

The new instruction should be used in cases where the evidence raises the question of whether the accused possessed the necessary state of mind for an offense even though the evidence does not raise a defense of lack of mental responsibility. Unlike the defense of a lack of mental responsibility—where the court members must make predicate findings relating to the accused's mental condition—the "defense" of lack of mens rea requires only that the members have a reasonable doubt that the accused had the requisite state of mind.

Additionally, the *Benchbook* instruction on partial mental responsibility has been revised to comport with the new instruction on evidence negating mens rea.[52] The defense of partial mental responsibility exists in military law,[53] despite the statement in the *Manual* to the contrary.[54] The new instruction on partial mental responsibility should be used when the evidence raises both the defense of mental responsibility and the question of whether the accused possessed a necessary mens rea element. This defense is essentially the same as the "defense" of lack of mens rea; it requires only that the members have a reasonable doubt that the accused had a requisite state of mind.

In 1994, the COMA decided two cases that involved instructions about the defense of inability. In *United States v. Barnes*,[55] the accused obtained permission to take time off to have his car repaired so long as he reported to work the next morning. When Sergeant Barnes failed to appear at work the next day, his excuse was that, after having the car repaired, a couple approached him asking for a ride to a location approximately forty to seventy miles away for which they would pay him fifty dollars. The accused stated that he accepted this

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[44] 40 M.J. 606 (A.C.M.R. 1994).

[45] *See* DEP'T OF ARMY, REG. 608-99, FAMILY SUPPORT, CHILD CUSTODY, AND PATERNITY, para. 2-4 (4 Nov. 1985) (noncustodial military parent must pay an amount equal to the difference between BAQ at the with dependent rate and BAQ at the without dependent rate to the military parent having custody of the child(ren)).

[46] *Birdsong*, 40 M.J. at 610.

[47] *Id.* at 609 n.2.

[48] Update Memo 9, *supra* note 21, para. 5-17.

[49] MCM, *supra* note 2, R.C.M. 916(k)(2).

[50] *Id.*

[51] *See* Ellis v. Jacob, 26 M.J. 90 (C.M.A. 1988); United States v. Berri, 33 M.J. 337 (C.M.A. 1991).

[52] Update Memo 9, *supra* note 21, para. 6-5.

[53] Ellis v. Jacob, 26 M.J. 90 (C.M.A. 1990).

[54] MCM, *supra* note 2, R.C.M. 916(k)(2).

[55] 39 M.J. 230 (C.M.A. 1994).

offer and, on arriving at the designated location, one of the passengers pulled a gun on him, took his car and the fifty dollars, and forced him to walk home. This excuse surfaced at trial through the testimony of the accused's direct supervisor; however, the military judge failed to instruct on the defense of physical inability to return. The COMA held that the judge erred in failing to give the instruction.[56] This case serves as a reminder that:

> credibility and the persuasiveness of [one's] story are irrelevant to whether an affirmative defense has been raised. . . . It is not necessary that the evidence which raises an issue be compelling or convincing beyond a reasonable doubt. Instead, the instructional duty arises whenever "some evidence" is presented to which the fact finders might "attach credit if" they so desire.[57]

Because some evidence existed to show that Sergeant Barnes's "failure to return was not the result of 'his own willful and deliberate conduct,' the military judge was required to instruct on the affirmative defense of inability to return."[58]

In *United States v. Meeks*,[59] the accused, Sergeant Meeks, was ordered to deploy to Southwest Asia. After receiving this order, Sergeant Meeks sought medical help for depression and, after receiving treatment, he was diagnosed as being deployable. His commander then gave him an order to begin processing for the deployment, to which the accused responded, "I can't."[60] A sanity board, which convened before the trial, found that Sergeant Meeks was suffering from an adjustment disorder "rendering him unable to obey the order to deploy."[61] The defense's trial strategy was to show Sergeant Meeks's inability to obey the order, due to his anxiety and depression. As a result of this strategy, the military judge gave an instruction on the defense of partial mental responsibility,[62] but refused to give any instruction on physical inability.[63] The accused contended that he was entitled to both, but the COMA held that because the physical inability defense was "inextricably tied" to the lack of mental responsibility defense, a separate instruction on physical inability was unnecessary.[64] When similar defenses exist regarding an offense, the better and safer approach for military judges would be to instruct on all defenses raised or to obtain an affirmative waiver from the defense on one or more of the defenses.[65]

Military judges and counsel need to remember that the *Benchbook* is not sacrosanct and is only a general guide to be tailored to the specific facts of a particular case. In *United States v. Martinez*,[66] the judge neglected this important principle in charging the court members on the defense of self-defense. Seaman Apprentice Martinez brandished a knife and warned a group of four to five drunken, racially motivated, but unarmed attackers not to come near him. When the men continued to approach, Martinez ran away, but was overtaken, beaten, kicked, and dragged. Martinez swung his knife in a frantic attempt to get away and, as he was running away, felt the knife cut somebody. He was able to retreat to a car, where his attackers began punching at him through an open car window. Although the accused did not remember using the knife

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[56] *Id.* at 232-33.

[57] *Id.* at 232 (quoting United States v. Taylor, 26 M.J. 127, 129 (C.M.A. 1988)). For cases decided in 1994 where appellate courts held that the military judge properly failed to instruct on potential defenses because they were not reasonably raised by the evidence, *see, e.g.*, United States v. Hensler, 40 M.J. 892 (N.M.C.M.R. 1994) (involuntary intoxication not raised as part of defense of lack of mental responsibility); United States v. Jackson, 40 M.J. 820 (N.M.C.M.R. 1994) (mistake of fact not raised as a defense to rape).

[58] *Barnes*, 39 M.J. at 233 (quoting United States v. Myhre, 25 C.M.R. 294, 295 (C.M.A. 1958)).

[59] 41 M.J. 150 (C.M.A. 1994).

[60] *Id.* at 153.

[61] *Id.*

[62] The defense of partial mental responsibility exists in military law despite Rule for Court-Martial 916(k)(2) stating otherwise. Ellis v. Jacob, 26 M.J. 90 (C.M.A. 1990). *See* Update Memo 9, *supra* note 21, para. 6-5.

[63] The defense of physical inability would exist if the accused's condition made it impossible for him to obey the order. The defense is one of:

> a matter of degree, and it will not justify the acts of the accused in refusing to comply with the order unless such refusal was reasonable in light of the fact and extent of the ailment, its relation to the task imposed or other subject matter of the order, the pressing nature or the circumstances involved, and any other relevant circumstances.

See United States v. Tolle, 39 C.M.R. 297, 299 (A.B.R. 1968).

[64] *Meeks*, 41 M.J. at 154-55.

[65] Although judges have a sua sponte obligation to instruct on affirmative defenses when raised by the evidence, a defense counsel may affirmatively waive an instruction on a defense. *See* United States v. Barnes, 39 M.J. 230, 233 (C.M.A. 1994) (citing United States v. Strachan, 35 M.J. 362 (C.M.A. 1992), *cert. denied*, 113 S. Ct. 1595, (1993)). *Strachan* involved an affirmative waiver of a lesser-included offense, but *Barnes* also indicates that an affirmative waiver can apply to defenses.

[66] 40 M.J. 426 (C.M.A. 1994).

issued by the Office of the Chief Trial Judge, United States Army Trial Judiciary.[87] This new instruction should be given when a witness testifies under a grant of immunity or in exchange for leniency, to explain how the grant of immunity or promise may affect credibility.

Procedural Instructions

The most important development in the area of procedural instructions involved the language of the reasonable doubt instruction. The *Benchbook* included the language that "proof beyond reasonable doubt means proof to a moral certainty although not necessarily an absolute or mathematical certainty."[88] The Supreme Court and the COMA criticized this "moral certainty" language in several recent cases.

In *Victor v. Nebraska*,[89] the Supreme Court considered reasonable doubt instructions in two murder cases. In one case, the trial judge defined reasonable doubt as, among other things, "not a mere possible doubt," but one such that the jurors could not say they felt an abiding conviction "to a moral certainty, of the truth of the charge." In the other case, the trial judge defined reasonable doubt as, among other things, a doubt that will not permit an abiding conviction, "to a moral certainty," of the accused's guilt. Although the Supreme Court found that neither of these instructions violated the Due Process clause, it criticized use of the "moral certainty" language.[90] In her concurring opinion, Justice Ginsburg suggested using a more precise reasonable doubt instruction proposed by the Federal Judicial Center.[91]

In *United States v. Meeks*,[92] the COMA found that the military judge did not err by giving a reasonable doubt instruction which included the "moral certainty" language from the *Benchbook*. The COMA found that the *Benchbook* instruction was sufficiently clear, when compared with the instructions in *Victor v. Nebraska*.[93] However, the COMA suggested reexamination of the *Benchbook* instruction.[94]

The military has changed the *Benchbook* instruction in response to this criticism. In the Army, the words "moral certainty" in the instruction have been replaced with the words "evidentiary certainty."[95] The Air Force[96] and the Navy and

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[87] Update Memo 10, *supra* note 22.

[88] BENCHBOOK, *supra* note 3, para. 2-29.1.

[89] 114 S. Ct. 1239 (1994).

[90] The Court distinguished these instructions from the reasonable doubt instruction it found unconstitutional in Cage v. Louisiana, 498 U.S. 39 (1990). In *Cage*, reasonable doubt was defined as "such doubt as would give rise to a grave uncertainty," "an actual substantial doubt," and "not an absolute or mathematical uncertainty, but a moral certainty." The Court found this to be unconstitutional because the language "grave" and "substantial," when used in conjunction with "moral certainty" could be interpreted improperly.

[91] *Victor*, 114 S. Ct. at 1253 (Ginsburg, J., concurring in part and concurring in the judgment). The instruction recommended by the Federal Judicial Center reads as follows:

> [T]he government has the burden of proving the defendant guilty beyond a reasonable doubt. Some of you may have served as jurors in civil cases, where you were told that it is only necessary to prove that a fact is more likely true than not true. In criminal cases, the government's proof must be more powerful than that. It must be beyond a reasonable doubt.
>
> Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty. If on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty.

Id. *See* Federal Judicial Center, Pattern Criminal Jury Instructions 17-18 (1987) (instruction 21).

[92] 41 M.J. 150 (C.M.A. 1994).

[93] The CAAF came to the same conclusion in United States v. Loving, 41 M.J. 213, 281 (1994).

[94] *Meeks*, 41 M.J. at 150 n.2. The COMA suggested use of the instruction recommended by the Federal Judicial Center. *See supra* note 91.

[95] Update Memo 11, *supra* note 4, at 2-68.

[96] The new Air Force reasonable doubt instruction reads as follows:

> A reasonable doubt is a conscientious doubt, based upon reason and common sense, and arising from the state of the evidence. Some of you may have served as jurors in civil cases, or as members of an administrative board, where you were told that it is only necessary to prove that a fact is more likely true than not true. In criminal cases, the government's proof must be more powerful than that. It must be beyond a reasonable doubt.
>
> Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the accused's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the accused is guilty of the crime charged, you must find (him) (her) guilty. If on the other hand, you think there is a real possibility that the accused is not guilty, you must give (him) (her) the benefit of the doubt and find (him) (her) not guilty.

Memorandum, United States Air Force Trial Judiciary, subject: Reasonable Doubt Instruction (8 Apr. 1994).

Marine Corps[97] have adopted versions of the Federal Judicial Center Instruction suggested in *Victor v. Nebraska.*

In *Garrett v. Lowe*,[98] the COMA discussed instructions on voting procedures. In *Garrett*, the accused asked the military judge to instruct the members that a three-fourths vote was required to convict him of felony-murder, because such a conviction would result in a mandatory life sentence, which requires a three-quarters vote to impose. The COMA upheld the military judge's denial of this request, finding that the clear language of the statute[99] authorized conviction of felony murder by a two-thirds majority vote.

In *United States v. Perez*,[100] the COMA dealt with the issue of reconsideration. In *Perez*, the accused was convicted of conspiracy to commit larceny. Although the members voted to convict, prior to announcing findings the president of the court informed the judge that the members had agreed unanimously to except out the overt act element of the conspiracy charge. The defense argued that this amounted to an acquittal and asked the military judge to enter a finding of not guilty. The judge refused to do so. Instead, the judge instructed the members that their findings contained an "inherent inconsistency" and directed them to reconsider. The members ultimately found the accused guilty of conspiracy as charged. The COMA upheld the judge's ruling, finding that the judge had the authority to direct the members to reconsider a defective verdict. However, the COMA also mentioned another course of action; the judge could have instructed the members that their findings amounted to a finding of not guilty and then informed them that they could reconsider this finding. In the authors' opinion, this instruction would have been safer, because it would have avoided directing the members to reconsider their findings, while allowing them to decide whether to reconsider the findings on their own.

Several procedural developments in instructions occurred as a result of Change 6 to the *Manual*.[101] This change, which became effective 21 January 1994, gave members a new option for finding an accused guilty: the accused now may be found guilty of a named lesser-included offense.[102] A new findings worksheet which reflects this change is located at Appendix B of this article. Additionally, Change 6 gave the military judge the option of giving instructions before or after argument, or at both times.[103]

Sentencing Instructions

Several recent cases dealt with sentencing instructions. In *United States v. McElroy*,[104] the military judge instructed the members that a punitive discharge does not forfeit vested benefits from a prior period of service. On appeal, the accused argued that this instruction was improper because these benefits may be lost if an accused is convicted of certain offenses—such as mutiny, treason, sabotage, assisting the enemy, sedition, and spying. The COMA upheld the sentence because the accused was not convicted of any of these offenses. A new instruction informing the members that benefits from prior enlistments are not forfeited by a discharge has been included in an update issued by the Office of the Chief Trial Judge, United States Army Trial Judiciary.[105]

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[97] The new Navy and Marine Corps reasonable doubt instruction reads as follows:

> [Some of you may have served as jurors in civil cases, or as board members in administrative boards, where you were told that it is only necessary to prove that a fact is more likely true than not true. In criminal cases, the government's proof must be more powerful than that. It must be beyond a reasonable doubt.]
>
> By reasonable doubt is intended not a fanciful, speculative, or ingenious doubt or conjecture, but an honest and actual doubt suggested by the material evidence or lack of it in the case. It is a genuine misgiving caused by insufficiency of proof of guilt. Reasonable doubt is a fair and rational doubt based upon reason and common sense, and arising from the state of the evidence. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the accused's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the accused is guilty of the crime charged, you must find him/her guilty. If on the other hand, you think there is a real possibility that he/she is not guilty, you must give him/her the benefit of the doubt and find him/her not guilty.
>
> The rule as to reasonable doubt extends to every element of the offense, although each particular fact advanced by the prosecution that does not amount to an element need not be established beyond a reasonable doubt. However, if on the whole evidence, you are satisfied beyond a reasonable doubt of the truth of each and every element, then you should find the accused guilty.

Memorandum, United States Navy-Marine Corps Trial Judiciary, subject: Reasonable Doubt Instruction (20 May 1994).

[98] 39 M.J. 293 (C.M.A. 1994).

[99] UCMJ art. 52 (1988).

[100] 40 M.J. 373 (C.M.A. 1994).

[101] MCM, *supra* note 2 (C6 23 Dec. 1993).

[102] *Id.* R.C.M. 918(a)(1) (C6 23 Dec. 1993).

[103] *Id.* R.C.M. 920(b) (C6 23 Dec. 1993).

[104] 40 M.J. 368 (C.M.A. 1994).

[105] Update Memo 11, *supra* note 4, at 2-135 to 2-136.

In *Garrett v. Lowe*,[106] the military judge erred by straying from the *Benchbook* instructions to "simplify" the members' voting procedures. In *Garrett*, the accused was convicted of felony-murder and received a mandatory life sentence. During presentencing proceedings, the judge instructed the members that they need not vote on the mandatory life portion of the sentence, and only needed a two-thirds vote for the other portions of the sentence. The COMA found this instruction to be prejudicial error; the entire sentence required a three-fourths vote, even though the life sentence was mandatory.[107] Military judges must be careful to adhere to the *Benchbook* and not attempt to create new voting procedures.

United States v. Green[108] also involved error caused by failure to follow the *Benchbook*. During his sentencing instructions, the military judge departed from the *Benchbook* instructions by failing to inform the members that their vote must be by secret written ballot.[109] The defense failed to object to the judge's instructions. Although the COMA found the judge's omission to be error, it held that the omission did not constitute plain error,[110] because the rest of the instructions adequately ensured that the members' deliberations were properly conducted.[111]

United States v. Butler[112] is another example of a military judge's failure to follow the instructions in the *Benchbook*. In *Butler*, the accused was tried by a special court-martial authorized to impose a bad-conduct discharge. During their sentencing deliberations, the members initially attempted to impose a sentence that included a "general discharge" and annotated this on the sentence worksheet. When the military judge examined the worksheet, he informed the members that they had no authority to adjudge any type of discharge other than a bad-conduct discharge. He then instructed them to "go back and deliberate and arrive at a legal sentence . . . ." Neither party objected to these instructions and the members eventually imposed a sentence including a bad-conduct discharge. On appeal, the accused alleged that the members impermissibly increased the sentence without proper instructions on the procedures for reconsideration. The COMA found that the military judge did not err by ordering members to reconsider their illegal sentence. However, a safer procedure would have been to inform the members that their sentence was illegal and then instruct them on the procedures for reconsideration.

Sometimes the military judge must improvise when a situation not addressed in the *Benchbook* arises. *United States v. Cannon*[113] is an example of this predicament. In *Cannon*, during sentencing deliberations, the president of the court asked for additional instructions concerning the relationship between discussion and voting on proposed sentences. In accordance with the *Benchbook* and the *Manual*, the military judge instructed the members that following a full and free discussion on sentencing, the proposed sentences are arranged in order of severity. He then departed from the *Benchbook* and advised the president that further discussion was discretionary and that he could call for a vote, subject to being overruled by a majority of the members. The AFCMR held that this instruction was proper, although it had no basis in the *Manual* or precedent. The AFCMR disagreed with the suggestion that the military judge should respond to questions by simply repeating instructions already given or recognized. The AFCMR stated that "[a] court-martial is not a scripted procedure but a dynamic event," and noted that "[t]he military judge must be able to respond to new or unanticipated events using his or her best judgment."[114]

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[106] 39 M.J. 293 (C.M.A 1994).

[107] In United States v. Gonzalez, 39 M.J. 459 (C.M.A. 1994), another murder case in which the accused received a mandatory life sentence, the military judge also instructed the members that they only needed a two-thirds vote to impose any sentence other than death. The COMA found this instruction in error, but found no possibility of prejudice. The panel consisted of eight members; two-thirds or three-fourths of that number was six. *Id.* at 459 n.2.

[108] 41 M.J. 57 (C.M.A. 1994).

[109] *See* Update Memo 11, *supra* note 4, at 2-101, which includes the language "[y]ou then vote on the proposed sentences by secret written ballot."

[110] Ordinarily, the military judge has a sua sponte duty to instruct on sentencing voting procedures. MCM, *supra* note 2, R.C.M. 1005, 1006. Normally, a sua sponte duty means that the military judge must give the instructions even absent a defense request: defense silence will not constitute waiver. *See* United States v. Taylor, 26 M.J. 127 (C.M.A. 1988) (because judge had sua sponte duty to instruct on lesser-included offenses, waiver doctrine did not apply). However, the COMA has been willing to impose the waiver doctrine to relatively minor omissions in the judge's instructions on sentencing voting procedures, if the defense fail to object. *See* United States v. Fisher, 21 M.J. 327 (C.M.A. 1986).

[111] The COMA pointed out that the primary evil the secret written ballot was designed to prevent was the use of rank to influence junior members. In *Green*, the military judge instructed the members that the "influence of superiority in rank shall not be employed in any manner to control the independence of members . . .." *Id.* at 58.

[112] 41 M.J. 211 (C.M.A. 1994).

[113] 39 M.J. 980 (A.F.C.M.R. 1994).

[114] *Id.* at 983.

Sometimes the military judge must instruct on the limited use of certain kinds of evidence during sentencing.[115] However, in *United States v. Briggs*,[116] the military judge properly denied a defense request to give this limiting instruction. In *Briggs*, the accused was convicted of three specifications of use of cocaine and several unrelated offenses. In his sworn testimony during sentencing, the accused, in response to a question from his defense counsel, stated that he sold drugs for a profit to finance his drug habit. Although the defense requested a specific uncharged misconduct instruction, the judge refused to give one because he did not want to highlight the issue for the members. The judge instructed the members that the accused should only be sentenced for the offenses for which he was convicted. The ACMR upheld the judge's decision, because the judge's general instructions adequately addressed the issue.

In *United States v. Loving*,[117] the CAAF[118] upheld the military's death penalty sentencing instructions. The defense raised several objections to the trial judge's sentencing instructions.[119] The defense argued that the trial judge should have specifically instructed the members that race could not be considered as a factor in sentencing. However, the CAAF found that such an instruction was not required.[120] The defense also argued that the judge's use of the *Benchbook* instruction, which informed the members that they could not impose the death penalty unless they found that the extenuating and mitigating factors were substantially outweighed by the aggravating factors,[121] was inadequate. The defense asserted that the judge should have explicitly told the members that they could decline to impose the death penalty, even if they found that extenuating and mitigating factors were substantially outweighed by aggravating factors.[122] However, the CAAF found that the judge's instructions were adequate.[123] The CAAF relied, in part, on the sentencing worksheet, which clearly indicated that the death penalty was permissible, not mandatory. *Loving* reaffirms the importance of taking extra care in drafting instructions and worksheets in a capital case.

Conclusion

As in recent years, the cases decided during the past calendar year demonstrate that military judges and counsel must remain diligent to properly frame instructions to court members. Unlike the majority of areas in the armed forces, the "down sizing" of the military has no effect in the area of instructions in courts-martial. Military appellate courts still require military judges to give complete instructions tailored to the facts of the case. However, the courts also will apply waiver generously when counsel fail to object. Because of the waiver doctrine, counsel should become more involved in the process of forming the instructions the judge gives to court members.

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[115] *See* MCM, *supra* note 2, MIL. R. EVID. 105, which requires the military judge to give an instruction on the limited use of evidence "upon request."

[116] 39 M.J. 600 (A.C.M.R. 1994).

[117] 41 M.J. 213 (1994).

[118] This is the new name for the Court of Military Appeals. *See supra* note 7.

[119] The defense also raised several objections to the trial judge's findings instructions, some of which have been discussed elsewhere in this article. *See supra* notes 73 and 90.

[120] *Loving*, 41 M.J. at 274.

[121] BENCHBOOK, *supra* note 3, para. 2-61.

[122] Such an instruction is currently contained in the Army's new trial script. *See* Update Memo 11, *supra* note 4, at 2-183.

[123] *Loving*, 41 M.J. at 276-79.

APPENDIX A

Instructions Checklist

I. Prior to Findings
- A. Preliminary Remarks.
  - 1. Initial Instructions to the Court (Page 2-43, Update Memo 11)..... ( )
  - 2. Other General Introductory Explanations..... ( )
    - a. Joint Offenders (Paragraph 7-2)..... ( )
    - b. _____..... ( )
- B. Elements of Offenses Charged (para ____; para ____;para ____)..... ( )

CH/SP_____ LIO_____ ( )
CH/SP_____ LIO_____ ( )
CH/SP_____ LIO_____ ( )

  - 1. Terms having special legal significance/ connotation (para____; para____; para____)..... ( )
  - 2. Law of Principals (Paragraph 7-1)..... ..... ( )
- C. Other Lesser-Included Offenses (para___; para___)..( ) (Including definition of terms having special legal connotation)
- D. Special and Other Defenses.
  - 1. Self-Defense (Paragraph 5-2)..... ( )
  - 2. Defense of Another (Paragraph 5-3)..... ( )
  - 3. Accident (Paragraph 5-4, Update Memo 7)..... ( )
  - 4. Duress or Coercion (Paragraph 5-5)..... ( )
  - 5. Entrapment (Paragraph 5-6)..... ( )
  - 6. Agency (Paragraph 5-7)..... ( )
  - 7. Obedience to Orders (Paragraph 5-8)..... ( )
  - 8. Physical Impossibility or Inability (Paragraph 5-9)..... ( )
  - 9. Financial and Other Inability (Paragraph 5-10). .. ( )
  - 10. Ignorance or Mistake of Fact of Law (Paragraph 5-11)..... ( )
  - 11. Voluntary Intoxication (Paragraph 5-12)..... ( )
  - 12. Alibi (Paragraph 5-13)..... ( )
  - 13. Character Evidence (Paragraph 5-14)..... ( )
  - 14. Voluntary Abandonment (Paragraph 5-15, Update Memo 7)..... ( )
  - 15. Parental Discipline (Paragraph 5-16, Update Memo 8)..... ( )
  - 16. Evidence Negating Mens Rea (Paragraph 5-17, Update Memo 9)..... ( )
  - 17. Self-Help Under a Claim of Right (Paragraph 5-18, Update Memo 13)..... ( )
  - 18. Mental Responsibility at Time of Offense (Paragraph 6-3, 6-4, Update Memo 9)..... ( )
  - 19. Partial Mental Responsibility (Paragraph 6-5, Update Memo 9)..... ( )
  - 20. Personality (Character or Behavior) Disorders (Paragraph 6-6, Update Memo 9)..... ( )
  - 21. Other..... ..... ( )
- E. Evidentiary and Other Matters
  - 1. Pretrial Statements (Chapter 4)..... ( )
  - 2. Law of Principals (Paragraph 7-1)..... ..... ( )
  - 3. Joint Offenders (Paragraph 7-2)..... ( )
  - 4. Circumstantial Evidence (Paragraph 7-3, Update Memo 1)..... ..... ( )
    - a. Proof of intent by circumstantial evidence (Paragraph 7-3, Update Memo 1)..... ( )
    - b. Proof of knowledge by circumstantial evidence (Paragraph 7-3, Update Memo 1)..... ( )
  - 5. Stipulations (Paragraph 7-4)..... ( )
  - 6. Depositions (Paragraph 7-5)..... ( )
  - 7. Judicial Notice (Paragraph 7-6)..... ( )
  - 8. Credibility of Witness (Paragraph 7-7)..... ( )
  - 9. Interracial Identification (Paragraph 7-7.1)..... ( )
  - 10. Character Evidence (Paragraph 7-8)..... ( )
  - 11. Expert Testimony (Paragraph 7-9, Update Memo 10)..... ( )
  - 12. Accomplice Testimony (Paragraph 7-10)..... ( )
  - 13. Prior Statements by Witness (Paragraph 7-11..... ( )
  - 14. Accused's Failure to Testify (Paragraph 7-12)..... ( )
  - 15. Other Offenses or Acts of Misconduct by Accused (Paragraph 7-13)..... ( )
  - 16. Past Sexual Behavior of Nonconsensual Sex Victim (Paragraph 7-14)..... ( )
  - 17. Variance—Findings by Exceptions and Substitutions (Paragraph 7-15)..... ( )
  - 18. Value, Damage or Amount (Paragraph 7-16)..... ( )
  - 19. Spill-Over (Paragraph 7-17, Update Memo 8)..... ( )
  - 20. Have You Heard Impeachment Questions (Paragraph 7-18, Update Memo 8)..... ( )
  - 21. Grant of Immunity (Paragraph 7-19, Update Memo 10)..... ( )
- F. Instructions on Findings.
  - 1. Prefatory Instructions (Page 2-63, Update Memo 11)..... ( )
  - 2. Other Appropriate Instruction (Page 2-67, Update Memo 11)..... ( )
  - 3. Procedural Instructions on Findings (Page 2-72, Update Memo 11)..... ( )

II. Sentencing.
- A. Instructions on Sentence (Page 2-86, Update Memo 11)..... ( )
- B. Other Instructions on Sentence (Page 2-97, Update Memo 11) ..... ( )
  - 1. Summary of Evidence in Extenuation Mitigation _____..... ( )
  - 2. Accused's Failure to Testify/Failure to Testify Under Oath..... ( )
  - 3. Effect of Guilty Plea..... ( )
  - 4. Mendacity..... ( )
  - 5. Argument for Specific Sentence..... ( )
  - 6. Other..... ( )
- C. Concluding Instructions (Page 2-101, Update Memo 11)..... ( )

Notes/Remarks:

APPENDIX B[124]

Findings Worksheet

UNITED STATES)
)
V.) FINDINGS WORKSHEET
)
_____)

Note: After the members have reached their findings the President shall strike all inapplicable language and announce the findings by reading the remaining language. (Do *not* read the bold-faced print).

_____ this court-martial finds you:
(Name and rank of accused)

I. IN CASE OF COMPLETE ACQUITTAL, ANNOUNCE:

Of all Charges and Specifications: Not Guilty.

II. IN CASE OF CONVICTION OF ALL CHARGES AND SPECIFICATIONS, ANNOUNCE:

Of all Charges and Specifications: Guilty.

III. IN CASE OF CONVICTION OF SOME BUT NOT ALL CHARGES AND SPECIFICATIONS, ANNOUNCE:

Of the Specification of Charge I: (Not Guilty) (Guilty)
Of Charge I: (Not Guilty) (Guilty)

Of Specification 1 of Charge II: (Not Guilty) (Guilty)
Of Specification 2 of Charge II: (Not Guilty) (Guilty)
Of Charge II: (Not Guilty) (Guilty)

Of Specification 1 of Charge III: (Not Guilty) (Guilty)
Of Specification 2 of Charge III: (Not Guilty) (Guilty)
Of Specification 3 of Charge III: (Not Guilty) (Guilty)
Of Charge III: (Not Guilty) (Guilty)

(NOTE TO PREPARER: Each lesser-included offense should be listed on a separate page in the following format and all blanks should be filled in so the members need only read the language without making any modifications:)

IV. LESSER-INCLUDED OFFENSE FOR SPECIFICATION __ OF CHARGE __.

If you find the accused guilty of the lesser-included offense of (insert name of the lesser-included offense) in (the) Specification (__) of (the) Charge (__), read the following language instead of reading the language in Section III regarding (the) Specification (__) of (the) Charge (__):

Of (the) Specification (__) of (the) Charge (__): Not Guilty, but Guilty of (*insert name of the lesser-included offense*) (in violation of Article(*insert applicable number*)).

(Of (the) Charge (__), (as to (the) Specification (__):) Not Guilty, but Guilty of a violation of Article (*insert applicable number*)).

(NOTE TO PREPARER: The last page of the findings worksheet should be as follows:)

V. FORMAT FOR MAKING MINOR MODIFICATIONS TO A SPECIFICATION.

Cross out/fill in the blanks in the sample format below as appropriate and read the applicable language instead of the language in Section III on page 1 which corresponds to the specification. (If more space is required for making minor modifications to specification(s), use the language in the applicable sample below and write out the findings as to the other specification(s) on this page or on additional pages.)

A. Sample Findings by Exceptions:

Of (the) Specification (__) of (the) Charge (__): Guilty, except the word(s):"_____
_____
_____
_____
_____,"
Of the excepted word(s): Not Guilty.

B. Sample Findings by Exceptions and Substitutions:

Of (the) Specification (__) of (the) Charge (__): Guilty, except the word(s):"_____
_____
_____
_____,"
and substituting therefore the word(s):"_____
_____
_____,"
Of the excepted word(s): Not Guilty.
Of the substituted word(s): Guilty.

[124] For an example of a findings worksheet in a capital case, *see* BENCHBOOK *supra* note 3, app. B.

"Eligibility" Under the Equal Access to Justice Act in Government Contracts Litigation

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Introduction

General Provisions of the Act and Policy Considerations

The Equal Access to Justice Act (EAJA or Act) provides that certain parties, successful in litigation against the government, may recover from the government attorney fees and expenses associated with that litigation.[1] Enacted on a trial basis in 1981 and permanently enacted in 1986, the Act satisfies several general policy considerations. First, it provides more access to courts by decreasing the cost to certain parties of successful litigation with the government.[2] Second, it ensures that individuals and small businesses with limited resources are not deterred from seeking review or defending against unreasonable government action because of legal fees and other expenses associated with litigation.[3]

The EAJA in Government Contracting

The EAJA produces a significant amount of litigation in government contracting forums. Typically, contractors submit claims to the government under the Contract Disputes Act of 1978 (CDA)[4] and litigate those claims if denied. Contractors who prevail over the government may then file an application under the EAJA for reimbursement of fees and expenses associated with the litigation.[5] As one might surmise, EAJA litigation does not typically involve the Boeings or General Dynamics, firms clearly capable of bearing their own legal expenses in litigation with the federal government. Rather, it arises from the relatively small contractor or subcontractor, those firms not possessed of great wealth—the intended beneficiaries of the Act.

This article will describe and analyze eligibility requirements for recovery under the EAJA, as they apply in government contracting forums. Consequently, the article will survey only those cases arising in public contracting forums or those cases that have significant implications for the law of public contracting.

General Eligibility Under the EAJA

The EAJA appears in two different titles of the United States Code. As codified in title 5, the Act applies to agency adjudications.[6] As codified in title 28, the Act applies to court adjudications.[7] In both definitions, the Act provides that litigation fees and expenses incurred by a "prevailing party" in an adversary adjudication in which the government is the opposing party, may be recovered unless the position of the government in the litigation is "substantially justified" or unless "special circumstances" make the award unjust.[8] Additionally, prevailing parties must be eligible under the terms of the Act.

Small but significant differences exist between the two codifications concerning eligibility for award under the EAJA. The Act defines "party" differently for agency actions than for

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[1] 5 U.S.C.A. § 504 (West Supp. 1994); 28 U.S.C.A. § 2412 (West Supp. 1994).

[2] Union Precision and Engineering, ASBCA No. 37549, 92-3 BCA ¶ 25,028, *aff'd on recon.*, 93-1 BCA ¶ 25,337.

[3] Ellis v. United States, 711 F.2d 157 (Fed. Cir. 1983).

[4] 41 U.S.C.A. §§ 601-613 (West 1987 & Supp. 1994).

[5] 5 U.S.C.A. § 504(a)(1)(2) (West Supp. 1994); 28 U.S.C.A. § 2412(d)(1)(A)(B) (West Supp. 1994).

[6] 5 U.S.C.A. § 504(a)(1) (West Supp. 1994).

[7] 28 U.S.C.A. § 2412(b) (West Supp. 1994).

[8] 5 U.S.C.A. § 504(a)(1) (West Supp. 1994); 28 U.S.C.A. § 2412(d)(1)(A) (West Supp. 1994). "Prevailing party," "substantial justification," and "special circumstances" are self-contained subjects not related to eligibility and require inquiry outside the scope of this article.

court actions.[9] In the vast majority of cases, those differences have no effect on award. However, in a minority of cases—specifically those which involve subcontractors—the differences in the codifications can prove substantial. From an analytical viewpoint, eligibility is treated differently in agency adjudications when compared with courts. From a practical standpoint, the potential for award of attorney fees and costs in agency board actions is more restricted than in court litigation.

"Eligibility" in Agency Board Adjudications

Definitions of a Party

The EAJA, as applied to agency board actions, narrowly defines an eligible "party" in two distinct ways. To be eligible for award in an agency adjudication, the claimant must satisfy both definitions.

First, a party must satisfy the definitional requirements contained in the Administrative Procedures Act (APA).[10] Under the APA, a party is "a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency proceeding, and a person or agency admitted by an agency as a party for limited purposes."[11]

Secondly, the EAJA defines an eligible party in terms of its size and net worth. A party can be an *individual* whose net worth does not exceed two million dollars at the time the litigation is initiated. A party also may be any owner of an *unincorporated business*, or any *partnership, corporation, association, unit of local government*, or *organization* whose net worth does not exceed seven million dollars at the time the adversary adjudication is initiated and which has fewer than 500 employees at the time the litigation is initiated. The EAJA waives net worth and size limitations for certain tax exempt organizations and cooperative associations.[12]

Application of the "Party" Definitions

For award eligibility, the definitions of a "party" under the EAJA initially seem very straightforward. Indeed, in a majority of cases, applying these definitions proves simple. If an entity is admitted as a party and meets the net worth and size limitations, facial eligibility for award results. Unfortunately, reality always is punctuated by the exception, and the exception never is quite so simple.

Consider, for example, the following scenario. A prime government contractor—for its own convenience, or pursuant to a required subcontracting plan—subcontracts part of the work. The subcontractor, in the course of performance, encounters circumstances that give rise to a claim. The prime contractor, on behalf of the subcontractor, submits the claim to the government.[13] Subsequently, the claim is litigated. Having succeeded on the claim, the question becomes whether attorney fees are recoverable from the government under EAJA provisions.[14]

As previously noted, eligibility for an EAJA award in agency actions is a two-part test. First, is the claimant a

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[9] 5 U.S.C.A. § 504(b)(1)(B) (West Supp. 1994), applicable to agency adjudications, defines an eligible party as follows:

> (B) "party" means a party, as defined in section 551(3) of this title, who is (i) an individual whose net worth did not exceed $2,000,000 at the time the adversary adjudication was initiated, or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed $7,000,000 at the time the adversary adjudication was initiated, and which had not more than 500 employees at the time the adversary adjudication was initiated; except that an organization described in section 501(c)(3) of the Internal Revenue code of 1986 (26 U.S.C. 501(c)(3)) exempt from taxation under section 501(a) of such code, or a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)), may be a party regardless of the net worth of such organization or cooperative association. . . .

28 U.S.C.A. § 2412(d)(1)(C)(2)(B) (West Supp. 1994), applicable to court actions, defines an eligible party as follows:

> (B) "party" means (i) an individual whose net worth did not exceed $2,000,000 at the time the civil action was filed, or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed $7,000,000 at the time the civil action was filed, and which had not more than 500 employees at the time the civil action was filed; except than an organization described in section 501(c)(3) of the Internal Revenue Code of 1986 (26 U.S.C. 501(c)(3)) exempt from taxation under section of 501(a) of such code, or a cooperative association as defined by section 15a of the Agricultural Marketing Act (12 U.S.C. 1141j(a)), may be a party regardless of net worth of such organization or cooperative association;"

[10] 5 U.S.C.A. § 504(b)(1)(B) (West Supp. 1994).

[11] 5 U.S.C.A. § 551(3) (West 1977).

[12] 5 U.S.C.A. § 504(b)(1)(B) (West Supp. 1994). The question of how "net worth" shall be defined has been the subject of debate. In Drillers, Inc., EBCA No. 451-10-90(E), 91-3 BCA ¶ 24,197, the board concluded that generally accepted accounting principles would define the term. Under that standard, the board defined net worth as "calculated by subtracting total liabilities from total assets." The board concluded that the result of this calculation was known as "shareholder equity."

[13] The Contract Disputes Act of 1978 requires contractors to submit claims to contracting officers. 41 U.S.C.A. § 605(a) (West 1987). A contractor is defined by the act as "a party to a Government contract other than the Government." *Id.* § 601(4).

[14] As used here, the term "succeeded" should be taken to mean that the contractor was the prevailing party, that the position of the government was not substantially justified, and that no circumstances existed making an award under the EAJA unjust. 5 U.S.C.A. § 504(a)(1) (West Supp. 1994); 28 U.S.C.A. § 2412(d)(1)(A) (West Supp. 1994).

"party" as defined by the APA and incorporated by reference into the EAJA?[15] Second, does the claimant meet the net worth and size limitations contained in the Act?[16] The first part of this test can be answered by referring to the APA definition. A party is one who has sued the government. This begs the more complicated question of whether subcontractors can be proper parties. Stated differently, does the EAJA require privity of contract with the government to be a proper party or can a proper party be a third party to the prime contract (the one who stands to gain or lose on the claim irrespective of privity)? As to the second part of the test, one must determine whose net worth and size counts. Is it the net worth and size of the prime contractor (the one in privity with the government) or is it the net worth and size of the subcontractor (the beneficiary of the claim)?

In *Teton Construction Company*,[17] the Armed Services Board of Contract Appeals (ASBCA) considered this scenario. The board applied both tests in a short, legally correct but equitably disappointing opinion. The board first held that only the prime contractor, the one in privity with the government, can be the proper party in an EAJA application. Second, it held that the net worth and size of the prime contractor, not the subcontractor, determines eligibility for award under the Act. The board reached its decision in the following manner.

As to the first test, the board followed the general rule that subcontractors have no standing to sue the government on a contract in which no privity with the government exists. Rather, the ASBCA ruled that the subcontractor must sue the government, if at all, through the prime contractor. Citing *Erickson Air Crane Co. v. United States*,[18] the board emphasized

> it is a hornbook rule that, under ordinary government prime contracts, subcontractors do not have standing to sue the government under the Tucker Act . . . in the event of an alleged government breach or to enforce a claim under the Contract Disputes Act of 1978 . . . . The government consents to be sued only by those with whom it has privity of contract, which it does not have with subcontractors . . . . A party in interest whose relationship to the case is that of the ordinary subcontractor may prosecute its claims only through, and with the cooperation of, the prime, and in the prime's name.[19]

Having confirmed that only contractors in privity with the government may be proper parties under the Act, the board then addressed the issue of net worth and size. In this case, the prime contractor, Teton Construction, exceeded the EAJA's net worth and size limitations. The subcontractor, however, met those limitations. Naturally, Teton Construction claimed that the net worth and size of the subcontractor, the real party in interest, should control. Predictably, the board concluded that application of net worth and size limits should reflect those of the "party" as determined by the first part of the test—that is, Teton Construction.[20]

The board reasoned as follows. The EAJA is a partial waiver of sovereign immunity that allows prevailing parties to obtain from the government attorney fees and costs they otherwise would have no right to receive.[21] All waivers of sovereign immunity are construed narrowly. Therefore, if the net worth and size of Teton's subcontractor are to be considered for EAJA eligibility purposes, specific statutory language must be found authorizing such a determination. In the absence of this language, Teton Construction, a bona fide party under the APA definition and the only party in privity with the government, must meet the net worth and size limitations contained in the Act. Under this analysis, the board concluded that Teton Construction failed to meet those limitations and denied the contractor's EAJA application.[22]

In reaching this decision, the board failed to adequately acknowledge two salient features of the case. First, the decision, whatever its result, was of no consequence to the prime contractor, Teton Construction. Teton Construction only lent its name to the prosecution of a claim by its subcontractor. The real party in interest was Teton Construction's subcontractor, a company which *did* meet the size and net worth limitations of the EAJA. Thus, if the objective of the Act is to provide more access to courts by decreasing the costs of litigation in which the government is a party, it failed. Secondly, if the Act is meant to subsidize litigation efforts against the government of those least able to afford such expenses, it likewise failed.

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[15] 5 U.S.C.A. § 504(b)(1)(B) (West Supp. 1994).

[16] *Id.*

[17] ASBCA No. 27700, 87-2 BCA ¶ 19,766.

[18] 731 F.2d 810 (Fed. Cir. 1984).

[19] *Id.* at 813-14; *see also* Acousti Engineering Co. of Florida v. United States, 15 Cl. Ct. 698 (1988).

[20] *Teton Construction*, 87-2 BCA ¶ 19,766, at 100,017.

[21] *Id.* at 100,016.

[22] *Id.* at 100,017.

Several years later, in *Southwest Marine, Inc.*,[23] the ASBCA revisited the issue. The facts were remarkably similar to those of *Teton Construction*. The Navy contracted with Southwest Marine to refurbish one of its ships. Southwest Marine, in turn, subcontracted with Universal Painting and Sandblasting (Universal Painting) to do part of the work. During the course of contract performance, Universal Painting encountered conditions unanticipated by any of the parties, significantly increasing labor and material costs. Southwest Marine, pursuant to terms of its subcontract, submitted a claim to the Navy on behalf of Universal Painting. After the claim was denied, Southwest Marine successfully litigated on behalf of Universal Painting.[24] Southwest Marine then submitted an EAJA application providing Universal Painting's size and net worth. Southwest Marine exceeded the statutory limitations for eligibility purposes.[25] Relying largely on the authority provided by *Teton Construction*, the board rejected Southwest Marine's EAJA application. However, in doing so, it addressed inequities in the EAJA.[26]

In arguing its case, Southwest Marine, rather than attempting to distinguish *Teton Construction*, encouraged the board to overrule it. It did so on three bases. First, Southwest Marine conceded that its participation in the action was nothing more than a required means, for the benefit of Universal Painting, of satisfying the necessity for privity of contract with the government. Indeed, Southwest Marine referred to sponsorship of claims as a "legal fiction used to allow subcontractors to have their claims presented."[27] It suggested that the fiction be discarded. Second, Southwest Marine emphasized that while it was the party of record, Universal Painting was the real party in interest to the litigation. Southwest Marine was only a surrogate for Universal Painting whose real interests were at stake. By implication, this argument acknowledged that if attorney fees and costs were to be absorbed by someone other than the government, the real party in interest to the underlying litigation would do so. The third argument used by Southwest Marine was one of policy. It argued that the purpose of the EAJA was to decrease the costs of litigation with the government for those who could least afford to bear those expenses. To reject an application for attorney fees made on behalf of Universal Painting would thwart that purpose.

On the surface, it appears that Southwest Marine was essentially asking the board to abandon the rule requiring privity for a party to sue the government in contract. Additionally, Southwest Marine was asking that the board expand the waiver of sovereign immunity granted by the EAJA beyond its statutory language. Confronted with the prospect of abandoning precedent in two settled areas of law, the board's ruling against Southwest Marine was predictable, notwithstanding any equities favoring the subcontractor. However, the board did acknowledge those inequities in what it characterized as "inconsistent results in some instances" and invited Congress to legislatively cure the problem.[28]

Southwest Marine, or perhaps more correctly, Universal Painting, appealed the board's decision.[29] Predictably, the district court followed and agreed with the board's conclusions.[30] However, the district court highlighted two points not fully addressed in the prior board opinion.

First, the court noted that this case involved not one, but two, waivers of sovereign immunity. The first, of course, dealt with the EAJA. The second, however, involved the CDA[31] and better explains the rule that only those in privity with the government may sue it.[32] The CDA, itself a waiver of sovereign immunity authorizing suits against the government involving government contracts, allows only the contractor to bring an action before an agency board.[33] Thus, allowing subcontractor net worth and size to determine EAJA eligibility would require not only a broad construction of the EAJA, but would facially run counter to the waiver of sovereign immunity granted by the CDA.

[23] ASBCA No. 36287, 93-1 BCA ¶ 25,225.

[24] Southwest Marine, Inc., ASBCA No. 36287, 91-2 BCA ¶ 23,725.

[25] *Southwest Marine*, 93-1 BCA ¶ 25,225, at 125,642.

[26] *Id.* at 125,640.

[27] *Id.* at 125,641.

[28] *Id.* at 125,642.

[29] Southwest Marine, Inc. v. United States, No. C-92-3143-DLJ, 1992 U.S. Dist. LEXIS 19266 (N.D. Cal. Dec. 7, 1992). If the "party" meeting the definitions contained in EAJA has itself incurred no legal expense, can it nonetheless recover? This issue was addressed in T.H. Taylor, Inc., ASBCA No. 26494-0, 86-3 BCA ¶ 19,257. The board determined that fees incurred by the subcontractor for a claim brought in the prime contractor's name also are incurred by the prime for EAJA award purposes. Similarly, in Margaret Howard d/b/a River City Van & Storage, ASBCA Nos. 28648,29,097, 88-3 BCA ¶ 21,040, the board concluded that legal fees paid by an EAJA claimant's insurer were "incurred" for EAJA purposes. The EAJA claimant had, in effect, prepaid for legal services.

[30] Despite language to the contrary in the CDA, admiralty jurisdiction is exclusively vested in Federal District Courts. Thus, they are the appellate forums for ASBCA appeals involving CDA-founded maritime claims. Southwest Marine of San Francisco, Inc. v. United States, 896 F.2d 532 (Fed. Cir. 1990).

[31] 41 U.S.C.A. §§ 601-613 (West 1987 & Supp. 1994).

[32] *Southwest Marine*, 1992 U.S. Dist. LEXIS 19266.

[33] *Id. See also* 41 U.S.C.A. §§ 601(4), 606 (West 1987 & Supp. 1994).

To reach the result desired by Southwest Marine would require the following conclusions. The EAJA provides that only a "party" may be eligible for award of fees and expenses. The CDA requires privity of contract as a condition necessary to filing a claim and litigating disputes under the CDA. However, once a proper party for CDA and EAJA purposes files the claim, looking beyond the "party" to the real party in interest is authorized for net worth and size determinations. Significantly, nothing in the language of the EAJA, as it applies to agency boards, suggests this result. Indeed, as the district court implied, had Congress intended either statute to apply to the real party in interest instead of the party as more narrowly defined, the statute could have said so.[34]

Secondly, in addressing Southwest Marine's "real party in interest" argument, the court highlights seemingly conflicting congressional intentions. On the one hand, the EAJA was designed to increase access to courts for those least able to afford litigation with the government. Under this general policy, the net worth and size of the real party interest, notwithstanding precise statutory language, should control EAJA eligibility. On the other hand, the district court noted that when enacting the CDA, Congress specifically considered and rejected allowing subcontractors direct access to the government in contract disputes. Stated differently, Congress wanted to require that subcontractors sue through prime contractors rather than in their own names.[35] Thus, however persuasive the argument about thwarting congressional intent regarding the EAJA might be, that argument fails in two respects. First, the unambiguous language of the statute does not provide a specific basis for establishing eligibility with reference to the subcontractor. Secondly, even if this language were present, congressional intent, as expressed in the CDA, is facially to the contrary.[36]

After rejection by both the ASBCA and the Federal District Court, Southwest Marine further appealed to the United States Court of Appeals for the Ninth Circuit[37] (Ninth Circuit), where the result was the same. In reaching its decision, the Ninth Circuit noted an interesting peculiarity in the EAJA. The Act's codification applying to courts does not contain the APA definition of a party contained in the codification applying to agency boards. Notwithstanding this difference, the legislative history of the EAJA reflects a congressional intent that the same definition of a party apply to both the judicial and administrative codifications.[38] The Ninth Circuit also reviewed judicial cases involving "real party in interest" determinations. It concluded that while those cases lent "some credence"[39] to Universal Painting's position that it and not Southwest Marine was the interested party before the ASBCA, those cases did not support an expansive reading of the EAJA statute applying to administrative forums. Finally, the Ninth Circuit conceded there was "a certain appeal"[40] to Universal Painting's assertion that awards to real parties in interest in litigation before administrative forums would support the EAJA's broad policy goals. However, the Ninth Circuit also recognized that limiting language in the waiver of sovereign immunity applying to administrative forums frustrated achievement of those goals.

In the absence of future congressional action requiring otherwise, the decisions in *Teton Construction*[41] and *Southwest Marine*[42] produce the following conclusions. In agency actions, notwithstanding any economic burden imposed on the real party in interest, net worth and size for EAJA eligibility determinations will continue to be made based on one guiding question: who is in privity with the government? Only those in privity satisfy the first test of a party. Similarly, the second test (net worth and size limits) will be applied only to those in privity with the government.[43]

"Eligibility" in Court Adjudications

A Single Definition of Party

It would be comforting to conclude that Congress really knew what it was doing when it provided the framework for adjudicating EAJA claims. Presumably, there would be consistency between "eligibility" for EAJA awards in agency board actions and "eligibility" for EAJA awards in court

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[34] *Southwest Marine*, 1992 U.S. Dist. LEXIS 19266. By negative implication, derived from comparing the EAJA statute applicable to agencies with that applicable to courts, the EAJA says exactly what the court implies that it does.

[35] *Id.*

[36] *Id.*

[37] Southwest Marine, Inc. v. United States, No. 93-15165, 1994 U.S. App. LEXIS 34572 (9th Cir. Dec. 12, 1994).

[38] *Id.* n.3 (citing H.R. REP. No. 99-120, 99th Cong. 1st Sess. 4, at 15 (1985)).

[39] *Id.* at 9.

[40] *Id.* at 11.

[41] Teton Construction Co., ASBCA No. 27700, 87-2 BCA ¶ 19,766.

[42] Southwest Marine Inc., ASBCA No. 36287, 93-1 BCA ¶ 26,225, *aff'd*, No. C-92-3143, U.S. Dist. LEXIS 19226 (N.D. Cal. Dec. 7, 1992), *aff'd*, No 39-15165, 1994 U.S. App. LEXIS 34572 (9th Cir. Dec. 12, 1994).

[43] *See e.g.* Sentry Insurance, VABCA No. 2617E, 93-3 BCA ¶ 26,124, for an example applying these same rules and logic in the case of a surety who attempts to complete the contract of a terminated prime contractor.

actions. However, the statute that applies to federal court litigation does not incorporate by reference the APA definition of party contained in the statute applicable to agency adjudications.[44] Rather, the EAJA as applied to courts merely requires meeting the second part of the eligibility test under the agency statute—net worth and size limitations. Thus, in court actions, an eligible party is:

> an individual whose net worth did not exceed $2,000,000 at the time the civil action was filed, or the owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed $7,000,000 at the time the civil action was filed, and which had not more than 500 employees at the time the civil action was filed.[45]

As with the statute applying to agency board actions, this code section also waives net worth and size limitations for certain tax exempt organizations and cooperative associations.[46]

Application of the "Party" Definition: Real Parties in Interest

As previously indicated, the exclusion of the APA definition of a party in the statute applying to court actions has resulted in analyses of eligibility in court cases markedly different from those found in agency cases. As in agency cases, this has not affected the result in a majority of cases. However, for those cases involving subcontractors, the single definition of a party leaves open the possibility that in court actions, unlike agency actions, the net worth and size of the real parties in interest may be considered despite a subcontractor's absence of privity with the government. While no court has yet gone this far, case law addressing the issue certainly supports this conclusion.[47] Indeed, unlike agency opinions, the real party in interest is the controlling factor in court decisions addressing the issue of eligibility under the EAJA.

Teton Construction and *Southwest Marine*, both agency board cases, involved subcontractors whose net worth and size would have made them eligible for recovery under EAJA but for the privity and sovereign immunity problems noted above.[48] In both those cases, the prime contractors, in privity with the government, were ineligible for EAJA recovery because of net worth and size. A variation of this fact pattern occurred in *Design and Products, Inc. v. United States*.[49] This case suggests that under certain circumstances privity of an otherwise eligible party, an all-important factor for recovery in agency actions, may be *disregarded* in court applications to *prevent* EAJA recovery by contractors.

In *Design and Products*, a prime contractor prevailed in an action seeking an equitable adjustment on a construction contract with the Commerce Department.[50] Thereafter, the contractor filed an EAJA application seeking award of attorney fees and costs. Design and Products (D&P) was the party in privity with the government and met the net worth and size limitations imposed by the EAJA. The government, however, contested D&P's eligibility. D&P was a wholly owned subsidiary of VSE Corporation. The government correctly asserted that the parent company exceeded the net worth and size limitations of the Act. The government argued that the parent company, not in privity with the government, was the real party in interest and for that reason, its net worth and size should be determinative of D&P's eligibility for award.

In raising these assertions, the government noted that the president and both executive vice-presidents of D&P were also president, senior vice-president, and vice president, respectively, of the parent corporation. Additionally, the government noted that one of the directors of D&P also was a director of the parent corporation. Further, the government raised "questions"[51] whether the two corporations occupied the same offices, whether the executives of the parent oversaw and directed the operations of D&P, and whether and to what extent executives of the parent corporation were involved in the administrative and financial decisions of D&P. These factors, the government asserted, indicated that the parent, itself ineligible for an EAJA award, was the real party in interest in the case. As a consequence, the government urged that the application of the wholly owned subsidiary be denied.

In support of this position, the government analogized its position to and relied on the authority provided by *United States v. Lakeshore Terminal and Pipeline, Co.*,[52] where the

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[44] 28 U.S.C.A. § 2412(d)(2)(C) (West Supp. 1994).

[45] *Id.*

[46] *Id.*

[47] *See, e.g.*, Design and Products, Inc. v. United States, 20 Cl. Ct. 207 (1990); United States v. Lakeshore Terminal and Pipeline, Co., 639 F. Supp. 958 (E.D. Mich. 1986).

[48] *See supra* notes 17-36.

[49] 20 Cl. Ct. 207 (1990).

[50] *Id.*

[51] *Id.* at 211.

[52] 639 F. Supp. 958 (E.D. Mich. 1986).

district court adopted a totality of facts[53] approach in determining eligibility for award under the EAJA. In *Lakeshore*, rather than looking at the net worth and size of the party in privity with the government, the district court looked beyond privity and beyond the style of the case to determine the real party in interest. Apparently, the concerns raised by agency boards regarding the strict construction of waivers of sovereign immunity were not raised due to the absence of any language in the statute applicable to courts mirroring the APA's definition of a party.[54]

In *Lakeshore*, the contractor refused to convey certain property to the government as required by a contract option. Lakeshore was the company in privity with the government and met the EAJA's net worth and size limitations. It also was a wholly owned subsidiary of The Detroit and Mackinac Railroad, which exceeded the EAJA's net worth and size limits. The record revealed that the parent company performed "various administrative, account, insurance, and auditing functions"[55] for its subsidiary and occupied the same offices. Additionally, when the dispute arose between Lakeshore and the government, the general counsel from the parent company, and not the subsidiary, responded. The response was on the parent company's letterhead and made references to the parent's interests, pointedly overlooking that it was the subsidiary's dispute. The district court, "based on the totality of facts,"[56] found the parent company to be the real party in interest. Accordingly, because the parent company's net worth and size exceeded the EAJA threshold, the district court denied Lakeshore's application for costs.

In analyzing the facts in *Design and Products*,[57] the claims court distinguished *Lakeshore* in the following respects. First, it did not appear that D&P's parent company impeded the independent actions of the subsidiary. Nor did it appear that the parent company directed or financed the litigation. Additionally, no evidence existed to show that the parent company performed administrative functions of D&P. Finally, it did not appear that the parent company was the sole beneficiary of the EAJA application as had apparently been the case in *Lakeshore*. The only similarities between the two cases were the sharing of executives and the involvement of wholly owned subsidiaries. The claims court found neither of these facts dispositive. Thus, having satisfactorily distinguished facts between the two cases, the claims court found that D&P was the real party in interest to the underlying litigation, eligible in terms of net worth and size, and therefore eligible for award under the EAJA.[58] Notably, the claims court failed even to address the issue of privity with the government.

The results in both *Design and Products* and *Lakeshore* suggest that in a situation similar to that presented in *Teton Construction*, but occurring in federal court, net worth and size standards will be tested against the real party in interest. Further, these cases suggest that had Teton Construction pursued its claim in federal court, the subsequent EAJA application may well have been approved rather than denied. No court case as of yet reports this type of fact situation or reaches this result. However, assuming consistent application of the analysis applied in *Design and Products* and *Lakeshore*, subcontractors are better served for EAJA purposes by pursuit of claims in court rather than before the boards.

Eligibility of "Joint Venturers" and "Affiliates"

Two minor variations on the issue of eligibility for EAJA recovery should be addressed. They deal with affiliates and joint venturers. The practical and analytic difficulties resulting from differing definitions of "parties" between the EAJA statutes applying to courts and boards are not as apparent in EAJA litigation regarding these entities. The decisions of courts and boards, while neither voluminous nor addressing the same points exactly, may be characterized either as fairly harmonious or, at least, not disconnected.

When the government contract involves joint venturers, EAJA net worth and size limitations will be applied to all members of the joint venture.[59] For example, *D.E.W., Inc.* involved a contract awarded to "D.E.W., Inc., and D.E. Wurzbach, a joint venture."[60] When the joint venture filed its EAJA application, it provided only the net worth and size of the corporation. The government objected, asserting that the board should consider net worth and size of all components of the joint venture. The board agreed and, without analysis, considered the application in reference to both entities. Note that the joint venture as an entity was in privity with the government, not either of its components individually. Harkening back to the statutory definition of a party applicable to agen-

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[53] *Id.*

[54] Additionally, the court's analysis did not confront or explain away the linkage found in agency cases between the CDA and the EAJA. As stated above, that linkage implies that because the CDA requires privity to give a claimant standing, so too must the EAJA. *See supra* note 34.

[55] United States v. Lakeshore Terminal and Pipeline Co., 639 F. Supp. 958 (E.D. Mich. 1986).

[56] Design and Products, Inc. v. United States, 20 Cl. Ct. 207, 211 (1990) (citing *Lakeshore Terminal and Pipeline*, 639 F. Supp. at 962).

[57] *Id.* at 207.

[58] *Id.*

[59] D.E.W., Inc., ASBCA No. 36698, 90-3 BCA ¶ 23,019. The statute does not specifically address joint venturers. It does, however, address associations and any partnerships. By implication, joint ventures fit one or both of these categories. *See* 5 U.S.C.A. § 504(b)(1)(B) (West Supp. 1994).

[60] *D.E.W., Inc.*, 90-3 BCA ¶ 23,019, at 115,560.

cies, had the contract been in the name of only one of the participants, presumably the board would have looked solely at the net worth of the one in privity with the government.[61] However, the same could not necessarily be said of a real party in interest analysis performed by a court.[62]

In two cases, boards have addressed the issue of affiliates. In *Insul-Glass, Inc.*,[63] the board rejected an EAJA application because the aggregate net worth of the contractor and its affiliates were not included.[64] The contractor was one of a number of businesses all owned by the same persons and doing business from the same facilities. In *Decker & Co.*,[65] the board rejected a government assertion that the contractor was affiliated with another firm although the reasons for this decision are unclear. The board merely stated that an affidavit submitted by the contractor convinced them that no affiliation existed. Presumably, the other company did not meet the definition of an affiliate.

Interestingly, in neither *Lakeshore* nor *D.E.W. Inc.* does the board define exactly what constitutes an affiliate. For that, one must look either to the *Federal Acquisition Regulation (FAR)*[66] or the Model Rules for Implementation of the Equal Access to Justice Act in Agency Proceedings (Model Rules).[67] The two definitions, while not identical, basically comport with each other. The *FAR* provides that "business concerns are affiliates of each other when, either directly or indirectly, (1) one concern controls or has the power to control the other, or (2) a third party controls or has the power to control both."[68] Meanwhile, the Model Rules defines affiliates as

> any individual, corporation or other entity that directly or indirectly controls or owns a majority of the voting shares or other interests of the applicant, or any corporation or other entity of which the applicant directly or indirectly owns a majority or controls a majority of the voting shares or other interest. . . .[69]

Arguably, the *FAR* definition is broader than that contained in the Model Rules. However, the Model Rule definition is more persuasive. It was promulgated for specific application to the EAJA. The *FAR* definition, meanwhile, deals with the submission of bids rather than EAJA applications.

The courts have not dealt with affiliates and joint ventures directly. However, where, for example, an association representing a group of manufacturers sought recovery under the EAJA, the circuit court determined it ineligible after aggregating the net worth of all its members.[70] Accordingly, one can surmise that in a government contracting case involving affiliates or joint venturers, the courts likely would follow a course similar to that used by agency the boards.

Contrasts in Eligibility: Courts v. Boards

When contrasting the differing treatment of eligibility for EAJA awards in agency versus court proceedings, several points are worth mentioning. First, that agency boards reject out of hand—for good and cogent reasons—the argument that eligibility should be determined with reference to the real party in interest, is not surprising. Agency boards are constrained by language in their enabling legislation that requires consideration of eligibility by defining parties in two ways.[71] Courts, meanwhile, must deal with only one definition. Consequently, the contrast between agency and court treatment of the same issue is remarkable. Courts possess an unrestrained willingness to look beyond privity to the real party in interest for eligibility purposes. In cases not involving government contracts, courts regularly apply the "real party in interest" analysis to EAJA eligibility issues.[72] Even in government contracting cases, courts more readily embrace determining EAJA eligibility with reference to the real party in interest, at least where that embrace might result in denial of eligibility. The reason is fairly simple. Courts are not as constrained as agencies by limiting language in the waiver of sovereign immunity under the applicable version of the EAJA. Courts may look behind the style of the case, determine the real party in interest, and apply net worth and size limitations to that party.

[61] *See supra* notes 10-43.

[62] *See supra* notes 40-58.

[63] GSBCA No. 9910-C, 89-3 BCA ¶ 22,223.

[64] *Id.* The applicant has the burden of proving eligibility. *See* 1 C.F.R. § 315.104a (1994).

[65] ASBCA No. 38072, 92-3 BCA ¶ 25,057.

[66] GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. (Apr. 1, 1984) [hereinafter FAR].

[67] 1 C.F.R. pt. 315 (1994).

[68] FAR, *supra* note 66, 52.214-17.

[69] 1 C.F.R. § 315.104(f) (1994).

[70] National Truck Equip. Ass'n. v. National Highway Traffic Safety Admin., 972 F. 2d 669 (6th Cir. 1992).

[71] 5 U.S.C.A. § 504(b)(1)(B) (West 1994).

[72] *See* Unification Church v. I.N.S., 762 F.2d 1077 (D.C. Cir. 1985)

Second, agency boards have concluded that because the CDA[73] requires submission of claims by those in privity with the government, the EAJA also requires privity for parties to be eligible. Although unfortunate, this conclusion is understandable. This view relates back to inclusion in the EAJA statute applicable to agency boards of language requiring that a party be defined in conformity with the APA.[74] Accordingly, not only must an eligible claimant meet net worth and size limitations, it also must be a party in a technical sense. The CDA[75] similarly requires that a party, in a technical sense, be in privity of contract with the government. Thus, subcontractors, not in privity, are excluded in agency cases from being eligible parties. Interestingly, the need for privity in agency cases does not depend on any connection between the EAJA and the CDA. Nor does an analysis reaching that conclusion require any reference to the CDA. Rather, the requirement for privity in agency cases stems totally from the inclusion of the APA definition of a party in the agency EAJA statute. Without such language, the CDA provides no independent impediment to determining EAJA eligibility based on a real party in interest analysis.

Courts, on the other hand, have not suffered the same constraints as boards, primarily because they are not limited by the same statutory language as agencies. However, larger reasons permit a subjectively fairer result in court actions. The policy considerations of the EAJA and the CDA are different. The CDA requires that claims be submitted only by those in privity with the government for purposes of efficient contract administration.[76] Imposing this requirement allows easy association of subcontractor claims with a particular prime contract. However, efficient contract administration is not affected in any way by allowing, in an EAJA application, consideration of the net worth and size of the subcontractor rather than the prime. Indeed, the policy behind the EAJA would be more fully effectuated by looking to the real party in interest.[77] Accordingly, if the more narrow definition of a party were deleted from the agency EAJA statute, policy considerations of both the EAJA and the CDA could be realized. Courts are positioned to fully effectuate all policy considerations. As it stands, however, the unfortunate inclusion of those few words in the agency statute can serve to frustrate the purpose of the EAJA where subcontractor claims are involved.

Third, the real party in interest analysis used by courts is only reported in government contract cases where the government attempted to defeat EAJA claims. That is, the claimant was in privity, met net worth and size limits, yet the government attempted, successfully in one case, to have a court look beyond privity and determine whether an alleged real party in interest not in privity exceeded net worth and size limits.[78] Whether this analysis can be used to the advantage of a subcontractor whose prime exceeds net worth and size limits remains to be seen. However, this much is clear; the CDA's requirement of privity is not in apparent need of change. It satisfies a rational consideration.[79] Moreover, adhering to CDA rules advancing contract management policy considerations does not dictate frustrating advancement of EAJA policy considerations. At least in actions originating in courts, policy considerations of both acts may be achieved by requiring privity of those bringing claims, then looking beyond privity to the real party in interest for net worth and size determinations.

Finally, consider the practical effect for cases involving the claims of small subcontractors prosecuted in the name of prime contractors too large to meet the net worth and size limits imposed by the EAJA. In agency board appeals, net worth and size will be determined with reference to the prime contractor. Accordingly, if the prime's net worth and size exceed EAJA limits, the subcontractor has no hope of recovering its legal fees and expenses under the EAJA. On the other hand, if the case originates in a court rather than a board, limited precedent in government contract cases, general precedent in cases not involving government contracts, and cogent arguments suggest eligibility determinations made by reference to the real parties in interest rather than those strictly in privity with the government. Accordingly, all other things being equal, subcontractor claims prosecuted in court rather than boards promise greater chance of subsequent EAJA recovery of legal expenses.

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[73] 41 U.S.C.A. §§ 601-613 (West 1987 & Supp. 1994).

[74] 5 U.S.C.A. § 504(b)(1)(B) (West Supp. 1994).

[75] 41 U.S.C.A. § 605 (West 1987).

[76] Southwest Marine Inc. v. United States, No. C-92-3143-DLJ, 1992 U.S. Dist. LEXIS 19266 (N.D. Cal. Dec. 7, 1992) (citing S. REP. NO. 1118, 95th Cong., 2d Sess. 17, *reprinted in* 1978 U.S.C.C.A.N. 5235, 5251).

[77] *See* Unification Church v. I.N.S., 762 F.2d 1077 (D.C. Cir. 1985). This seminal case in the world of EAJA stands for the proposition that the third person who exercises control over the litigation should be treated as the "party" under the statute. *See also* National Truck Equip. Ass'n v. National Highway Traffic Safety Admin., 972 F.2d 669 (6th Cir. 1992).

[78] Design and Products, Inc. v. United States, 20 Cl. Ct. 207 (1990); United States v. Lakeshore Pipeline and Terminal Co., 639 F. Supp. 958 (E.D. Mich. 1986).

[79] Southwest Marine, Inc. v. United States, No. C-92-3143-DLJ, U.S. Dist. LEXIS 19266 (N.D. Cal. Dec. 7, 1992) (citing S. REP. No. 1118, 95th Cong., 2d Sess. 17, *reprinted in* 1978 U.S.C.C.A.N. 5235, 5251).

Conclusion

Determinations of eligibility for EAJA awards should be fairly simple. However, they are complicated by minor variances in definitions between the EAJA statutes applicable to courts and those applicable to boards. These differences are not easily overlooked because the statutes are waivers of sovereign immunity requiring strict construction. Unfortunately, the result is that agency boards are not as free as courts to effectuate the purposes of EAJA. Contractors and subcontractors should be aware of the minor differences in eligibility criteria between courts and boards and should factor the practical effects of those differences into their choice of forum.

Davis v. United States: Clarification Regarding Ambiguous Counsel Requests, and an Invitation to Revisit *Miranda*!

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Introduction

In *Davis v. United States*,[1] the United States Supreme Court rendered its first military justice decision with broad applications beyond the courts-martial system. One view of *Davis* is that the Court simply has reaffirmed the principle that invocation of the *Miranda*[2] right to counsel requires, at a minimum, some statement that reasonably can be construed as an expression of a desire for the assistance of an attorney.[3] The Court went on to clarify, however, that if a suspect makes a reference to an attorney that is equivocal *or ambiguous*, questioning need not be terminated.[4]

Additionally, and perhaps more significantly, Justice O'Connor's majority and Justice Scalia's concurring opinions signal the Court's willingness to consider a complete re-examination of the *Miranda* warning requirements that have become a fixture in American criminal procedure.

Ambiguous Counsel Requests

In the past, various state and federal jurisdictions used one of three methods of dealing with ambiguous requests for counsel.[5] In its *Davis* opinion, the COMA held that the proper rule is that ambiguous counsel requests must be clarified before continued interrogation.[6] The Supreme Court affirmed the COMA's decision, but disagreed with the lower court's reasoning.

Rejecting the positions advanced by both parties and the COMA, the Supreme Court reiterated that "a statement either

[1] 36 M.J. 337 (C.M.A. 1993), *aff'd on other grounds*, 114 S. Ct. 2350 (1994). Effective October 5, 1994, the National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663 (1994) (to be codified at 10 U.S.C. § 941), the United States Court of Military Appeals (COMA) was renamed the United States Court of Appeals for the Armed Forces. This article will use the title of the court that was in place when the decision was published.

[2] Miranda v. Arizona, 384 U.S. 436 (1966) (prior to initiation of custodial interrogation, suspects must be warned that they have the right to remain silent, that any statement they make may be used as evidence against them, and that they have the right to the presence of an attorney, either retained or appointed).

[3] *Davis*, 114 S. Ct. at 2355 (quoting McNeil v. Wisconsin, 501 U.S. 171, 178 (1991)).

[4] *Id.*

[5] In *Davis*, the COMA observed:

> Some jurisdictions have held that any mention of counsel, however ambiguous, is sufficient to require that all questioning cease. Others have attempted to define a threshold standard of clarity for invoking the right to counsel and have held that comments falling short of the threshold do not invoke the right to counsel. Some jurisdictions, including several federal circuits, have held that "all interrogation" about the offense "must immediately cease" whenever a suspect mentions counsel, but they allow interrogators to ask narrow questions designed to "clarify" the earlier statement and the accused's desires respecting counsel.

Davis, 37 M.J. at 341 (quoting Smith v. Illinois, 469 U.S. 91, 96 n.3 (1984)).

For a survey of the three standards, see Janet E. Ainsworth, *In a Different Register: The Pragmatics of Powerlessness in Police Interrogations*, 103 YALE L.J. 259, 299-315 (1993).

[6] *Davis*, 114 S. Ct. at 2355.

is such an assertion of the right to counsel or it is not."[7] The Court held that a statement concerning counsel is ambiguous if, in light of the circumstances, a reasonable officer would have understood only that the suspect "might be" invoking the right to counsel.[8] Although the Court noted that clarifying ambiguous requests often will be a good practice,[9] the Court declined to adopt a rule *requiring* officers to ask clarifying questions.[10]

In *Davis*, the Court reiterated that the "right to counsel" established in *Miranda* is not guaranteed by the Constitution.[11] Instead, the procedural requirements, established in *Miranda* and its progeny, are "measures to insure that the right against compulsory self-incrimination [is] protected."[12]

The Supreme Court also reaffirmed the principle that *Miranda* warnings were not designed with the intent of preventing a suspect from making an incriminating statement. Instead, the warnings were mandated to counteract the coercive effect of custodial interrogation.[13] Similarly, in *Edwards v. Arizona*,[14] the Court established a "second layer of prophylaxis"[15] for the so-called *Miranda* right to counsel. In *Edwards*, the Court held that if a suspect requests counsel at any time during a custodial interrogation, the suspect is not subject to further questioning until a lawyer has been made available or the suspect reinitiates conversation.[16] In *Davis*, the Court expressly declined to expand the *Edwards* barrier by requiring law enforcement officers to cease questioning because of an ambiguous or equivocal reference to an attorney."[17]

Rather than simply limiting expansion of *Edwards'* protection, however, the *Davis* "threshold of clarity" standard arguably erodes the prohibition against continued police questioning in the face of an expressed desire for assistance of counsel. Professor Yale Kamisar, of the Michigan Law School, recently noted that "sociolinguistic research indicates that certain segments of the population—women, African Americans, immigrants from Eastern Europe—are far more likely than other groups to avoid strong, assertive means of expression and to use indirect and hedged speech patterns that give the impression of uncertainty or equivocality."[18]

The Supreme Court apparently anticipated Professor Kamisar's argument. Recognizing that some suspects may fail to clearly articulate a subjectively held desire for a lawyer's assistance, the Court concluded that "the primary protection afforded suspects subject to custodial interrogation is the *Miranda* warnings themselves. 'Full comprehension of the rights to remain silent and request an attorney [is] sufficient to dispel whatever coercion is inherent in the custodial process.'"[19]

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[7] *Id.* (quoting *Smith*, 469 U.S. at 97-98) (brackets and internal citation marks omitted)).

[8] *Id.*

[9] "Clarifying questions help protect the rights of the suspect by ensuring that he gets an attorney if he wants one, and will minimize the chance of a confession being suppressed due to subsequent judicial second guessing as to the meaning of the suspect's statement regarding counsel." *Id.* at 2356.

[10] *Id.* at 2355.

[11] *Id.* at 2354 (quoting Michigan v. Tucker, 417 U.S. 433, 443-44 (1974)). The Fifth Amendment provides in relevant part, "No person . . . shall be compelled in any criminal case to be a witness against himself[.]" U.S. CONST. amend. V.

[12] *Davis*, 114 S. Ct. at 2354 (quoting *Tucker*, 417 U.S. at 443-44).

[13] *Id.* In *Miranda*, Chief Justice Warren's majority opinion engages in a lengthy discussion of police interrogation techniques. Numerous quotations from police training manuals and interrogation textbooks are included in the opinion to demonstrate the calculated nature of police interrogations. Before prescribing its landmark prophylactic warning requirement, the *Miranda* court concluded:

> It is obvious that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner. This atmosphere carries its own badge of intimidation. To be sure, this is not physical intimidation, but it is equally destructive of human dignity. The current practice of incommunicado interrogation is at odds with one of our Nation's most cherished principles—that the individual may not be compelled to incriminate himself. Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surrounding, no statement obtained from the defendant can truly be the product of his free choice.

Miranda v. Arizona, 384 U.S. 436, 458 (1966).

[14] 451 U.S. 477 (1981).

[15] McNeil v. Wisconsin, 501 U.S. 171, 176 (1991).

[16] *Edwards*, 451 U.S. at 484-85.

[17] Davis v. United States, 114 S. Ct. 2350, 2355 (1994).

[18] *Constitutional Law Conference Addresses Supreme Court's 1993-94 Term*, 56 Crim. L. Rep. (BNA) 1068-9 (Oct. 19, 1994) [hereinafter *Constitutional Law Conference*]. *See also* Ainsworth, *supra* note 5. In a similar vein, Justice Scalia harshly rejected the petitioner's argument during oral argument that the law must protect a suspect from his own inarticulateness by stating: "We cannot run a system for idiots." *See* Matthew Winter, *Do You Really Want a Lawyer?* ARMY LAW., June 1994, at 55.

[19] *Davis*, 114 S. Ct. at 2356 (quoting Moran v. Burbine, 475 U.S. 412, 427 (1986)).

The facts in *Davis* did not raise the issue of cultural diversity in the interpretation of the suspect's statement regarding counsel. However, in future cases, defense counsel should be alert for the opportunity to develop the facts concerning cultural diversity. With a proper factual basis, counsel might argue that the known cultural background of a suspect should play a significant role in how "a reasonable officer in light of the circumstances"[20] would interpret the suspect's statement regarding counsel. For example, a defense counsel may be able to show that, based on the training and experience of the interrogator and the cultural background of the suspect, the interrogator understood, or should have understood, the suspect's technically ambiguous or equivocal statement about a lawyer to be an actual request for counsel.[21]

Davis appears to resolve the split of authority regarding the need to clarify ambiguous counsel requests as a condition precedent to further questioning. However, adopting a "damn the torpedoes approach" to military suspects' tentative statements about lawyers may be premature. In *United States v. Morgan*,[22] following initial waiver of Article 31, Uniform Code of Military Justice (UCMJ)[23] and counsel rights,[24] the accused began talking with interrogators, but then asked, "Can I still have a lawyer or is it too late for that?"[25] Although the exact wording was subject to dispute, it generally was agreed that the interrogation stopped following Morgan's statement about a lawyer. The interrogators then asked some clarifying questions about whether Morgan wanted to talk to a lawyer. Morgan said "No" and the questioning continued.[26]

Interestingly, *Morgan* did not cite the Supreme Court opinion in *Davis* for the proposition that clarification is not required in the face of an equivocal or ambiguous request. Instead, the COMA simply cited *Davis* as authority for interrogators to ask clarifying questions.[27] The COMA then proceeded to analyze the nature of the investigators' clarifying questions, ultimately finding that the accused's subsequent explicit waiver was voluntary.[28]

The COMA's curiously imprecise reference to the Supreme Court's holding in *Davis* muddles the clarity of the new rule regarding ambiguous counsel requests. In *Davis*, although the Supreme Court suggested clarification as a procedure to avoid judicial second guessing about whether a statement was ambiguous or equivocal,[29] the Court held further that this clarification was not required. In *Morgan*, however, even though the COMA found that Morgan's statement constituted an equivocal request for counsel, it still proceeded to scrutinize the clarification process to determine whether Morgan's subsequent statements were admissible.[30] Morgan's statements made after his ambiguous counsel request were determined to be properly admitted only after the COMA had determined that his responses to the clarifying questions constituted a waiver of his right to counsel.[31] The COMA's analysis raises

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[20] *Id.* at 2355.

[21] In his comments to the United States Law Week's Constitutional Conference, Professor Kamisar described how some persons have a culturally based tendency to avoid assertive means of expression in settings involving an imbalance of power.

> Kamisar noted that one who addresses God cannot help but be aware of the enormous disparity of power and thus is likely to use indirect speech. This was surely on the mind of Tevye, the dairyman in *Fiddler on the Roof*, when he mused "Oh, if I were a rich man," Kamisar said. Tevye didn't come out and say, "Lord, make me rich today," or "I want you to make me rich right now." He was rather tentative: "So what would have been so terrible if I had a small fortune? Would it spoil some vast eternal plan if I were a wealthy man?"

Constitutional Law Conference, supra note 18, at 1069.

[22] 40 M.J. 389 (C.M.A. 1994).

[23] UCMJ art. 31 (1988). *See infra* note 57.

[24] In *Morgan*, the COMA prefaced its analysis of the counsel invocation issue by noting that the custodial element of the *Miranda* custodial interrogation trigger was not litigated. *Morgan*, 40 M.J. at 394. Morgan previously had been apprehended in connection with the offense that ultimately resulted in this court-martial. Subsequently, however, Morgan reported to an Air Force Office of Special Investigations office unescorted, and voluntarily submitted to a polygraph examination. The disputed statements were received during a postpolygraph interview. *Id.* at 390-91. Accordingly, although the requirement for UCMJ, Article 31 warnings was clear, Morgan arguably was not entitled to the *Miranda* counsel warning because he was not in custody.

[25] *Id.* at 391.

[26] *Id.* at 391-92.

[27] *Id.* at 393.

[28] *Id.* at 393-94.

[29] *See supra* note 9.

[30] *See Morgan*, 40 M.J. at 393-94.

[31] *Id.* at 394 ("[W]e hold that the military judge's finding of a 'clear and unequivocable' waiver of rights after the colloquy about a belated request for counsel is supported by the record.").

the question: "Why were they looking for a waiver?" Morgan already had waived his right to counsel at the beginning of the interrogation.[32] Accordingly, if his ambiguous remark about a lawyer was not a counsel request, no further waiver was necessary. Any analysis of the clarifying questions should have been limited to the issue of whether the agents were improperly discouraging an actual rights invocation. If Morgan had responded to the clarifying questions by stating that he wanted to talk with a lawyer, questioning necessarily would have stopped. Pursuant to the Supreme Court's holding in *Davis*, however, the agents did not have to secure an additional waiver during the clarification process before they could proceed with the interrogation.

From a practical standpoint, the COMA's analysis in *Morgan* makes it appear that rather than foreclosing the possibility of judicial second guessing, Morgan's interrogators effectively lost the "benefit" of the Supreme Court's *Davis* decision by making the effort to clarify an ineffective counsel invocation. Unfortunately, in an effort to provide extra paternal protection to Morgan, the COMA inadvertently may have encouraged some interrogators to ignore anything less than a clear counsel right invocation.[33]

To complicate matters further, ignoring an obviously ambiguous counsel request also may be unacceptable to the COMA. In *United States v. McLaren*,[34] the COMA addressed several *Edwards* issues[35] resulting from the accused's post-waiver statement to interrogators to the effect, "I think I want a lawyer."[36] Relying on their own recently released *Davis* opinion, the COMA found that in the face of an equivocal counsel request, interrogators have only two choices: "(1) terminate the interview or (2) conduct limited questioning to clarify appellant's comment.[37] The COMA also ruled that if the interrogators do not clarify an ambiguous request, the situation should be treated as if the accused had unequivocally requested a lawyer.[38]

The Supreme Court opinion in *Davis* appears to partially overrule *McLaren*, insofar as *Davis* permits continued ques-

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[32] *Id.* at 391 ("Appellant . . . waived his rights [and] agreed to make a statement . . . .).

[33] For example, consider this dialogue following an initial rights advisement and waiver:

Interrogator:	What happened next?
Suspect:	I don't know, maybe I should talk to a lawyer.
Interrogator:	Are you saying you want to talk to a lawyer?
Suspect:	I don't know, we all know I'm guilty. I'm so confused.
Interrogator:	Well, since we all know you're guilty, why don't you tell us how you did it.
Suspect:	[Series of incriminating remarks]

The suspect's initial statement about a lawyer is both ambiguous and equivocal. Under the Supreme Court's opinion in *Davis*, the interrogator may proceed without asking clarifying questions. Because the interrogator does nothing to discourage a rights invocation, the suspect's subsequent statements should be admissible. Following *Morgan*, however, the admissibility of the subsequent statements is open to debate. If the COMA is going to require explicit or implied waivers during the clarification process, some interrogators will undoubtedly decide to forego any effort to clarify ambiguous statements about lawyers. For example:

Interrogator:	What happened next?
Suspect:	I don't know, maybe I should talk to a lawyer.
Interrogator:	What happened next?
Suspect:	I don't know, we all know I'm guilty. I'm so confused.
Interrogator:	Well, since we all know you're guilty, why don't you tell us how you did it.
Suspect:	[Series of incriminating remarks]

This time the interrogator responds to the suspect's ambiguous statement by simply restating the previously asked question. The interrogator has elected to run the risk of being second guessed about the ambiguous nature of the initial statement about a lawyer. Proceeding in this fashion, however, forecloses analysis of whether the clarifying questions resulted in an effective second waiver.

[34] 38 M.J. 112 (C.M.A. 1993).

[35] *See generally* Criminal Law Practice Note, United States v. McLaren: *Reinitiation of Conversation by Accused May Constitute Implied Waiver of Previously Asserted Counsel Right*, ARMY LAW., Aug. 1994, at 52.

[36] *McLaren*, 38 M.J. at 114.

[37] *Id.* at 115.

[38] *Id.*

tioning without clarification of ambiguous or equivocal counsel requests. Unfortunately, *Morgan* is devoid of any reference to *McLaren* or any acknowledgement by the COMA that the Supreme Court opinion in *Davis* changes the rules regarding ambiguous requests. Accordingly, whether the COMA eventually will recognize the newly found limit of the *Edwards* barrier, or whether the COMA will endeavor to provide extra protection for service members beyond that required by the Constitution or the Supreme Court, is unclear.

Whichever ambiguous counsel request rule ultimately prevails in military justice practice, note that in *Davis*, the ambiguous counsel request followed a previous unambiguous waiver of the accused's *Miranda* right to counsel.[39] To enter, in its case-in-chief, a confession or admission taken from a subject undergoing custodial interrogation, the government still must prove a voluntary, knowing, and intelligent waiver of the subject's *Miranda* rights in the first instance.[40] Although an express waiver of the *Miranda* right to counsel is not necessary,[41] an ambiguous statement about a lawyer made in response to a rights warning should not be reviewed in terms of the *Davis* rule. Instead, questions regarding initial waivers should be analyzed based on the standards and factors set forth in cases such as *Moran v. Burbine*[42] and *Connecticut v. Barrett*.[43]

18 U.S.C. § 3501

Although *Davis* is important in it own right, its ultimate claim to fame may be as the case that signalled the beginning of the end for *Miranda* warnings. In his concurring opinion, Justice Scalia raised some broad questions regarding the conflict between the warning requirements prescribed in *Miranda*, and the provisions of 18 U.S.C. § 3501.

Section 3501 was enacted in 1968, in the wake of the procedural requirements set forth in *Miranda*.[44] Section 3501 provides for admission of confessions at trial based on a voluntariness determination in which provision of a rights advisement prior to interrogation is but one factor for consideration.[45] In large measure, § 3501 purports to reinstate the totality of the circumstances test that was used for voluntariness determinations for the thirty years preceding *Miranda*.[46] Justice Scalia points out, however, that federal prosecutors have "studiously avoided"[47] relying on § 3501 in any attempt to offer evidence of confessions rendered inadmissible because of the absence of *Miranda* warnings.[48]

While the idea of overruling *Miranda* may seem incredible, closer examination of the matter reveals that Justice Scalia is almost certainly interested in more than clearing dead wood from the United States Code. On review of Justice Scalia's

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[39] Davis v. United States, 114 S. Ct. 2350, 2353 (1994).

[40] Miranda v. Arizona, 384 U.S. 436, 475 (1966).

[41] North Carolina v. Butler, 441 U.S. 369, 373-76 (1979). Declining to extend *Miranda* procedural requirements to require an explicit waiver, the Court held that "the question of waiver must be determined on 'the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.'" *Id.* at 374-75 (citations omitted).

[42] 475 U.S. 412 (1985). Courts may properly conclude that *Miranda* rights have been waived only if the totality of the circumstances surrounding the interrogation reveals both an uncoerced choice and the requisite level of comprehension of the several rights. *Id.* at 421.

[43] 479 U.S. 523 (1987). Finding Barrett's statement that he would not make a written statement outside the presence of counsel did not amount to an invocation of the *Miranda* right to counsel, the Court held that requests for counsel must be given broad, all inclusive effect only when the defendant's words, understood as ordinary people would understand them, are ambiguous. *Id.* at 529-30.

[44] *Constitutional Law Conference, supra* note 18, at 1071.

[45] 18 U.S.C. § 3508(b) provides:

> (b) The trial judge in determining the issue of voluntariness shall take into considerations all the circumstances surrounding the giving of a confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel, and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.
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> The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of the voluntariness of the confession.

[46] *See* 1 WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE sects. 6.1-6.2 (1984 & Supp. 1991).

[47] Davis v. United States, 114 S. Ct. 2350, 2357 (1994) (Scalia, J. dissenting).

[48] *Id.*

invitation, the *Miranda* requirement to provide notice about assistance of counsel appears particularly vulnerable to attack.[49]

The Supreme Court created the "*Miranda* right to counsel" to support the actual language of the Fifth Amendment regarding the privilege against self-incrimination.[50]

> The circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators. Therefore the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today.[51]
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> . . . .
>
> Accordingly we hold that an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and have a lawyer with him during the interrogation under the system for protecting the privilege we delineate today.[52]

In imposing the *Miranda* warning requirements, however, the Court specifically recognized that the Constitution does not necessarily require any specific procedural mechanism to protect the privilege against self-incrimination.[53] That the counsel aspect of the *Miranda* warning is not constitutionally required was plainly restated in Justice O'Connor's majority opinion in *Davis*.[54]

Section 3501 specifically acknowledges the potential role of lawyers in the interrogation process. In contrast to *Miranda*, however, § 3501 does not make a warning about assistance of counsel an absolute prerequisite to an admissibility determination.[55] Instead, the statute provides that a warning concerning assistance of counsel is but one factor in a judicial voluntariness determination.[56]

Even if the Supreme Court determines that § 3501 eradicates some or all of the *Miranda* warning requirements as a prerequisite to admissibility, the statute's effect on the military justice system may be limited. The most obvious limiting

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[49] In *Miranda*, the Court stated that "the right to have counsel present at the interrogation is indispensable to the protection of Fifth Amendment privilege . . . ." Miranda v. United States, 384 U.S. 436, 469 (1966). For the purpose of this analysis, one must distinguish the concept of requesting counsel assistance from that of a warning requirement. Requesting assistance of counsel during interrogation is arguably tantamount to an invocation of the privilege against self-incrimination itself. In either case, the suspect has indicated an unwillingness to answer or to speak. A warning requirement, however, the violation of which renders an otherwise voluntary statement inadmissible, is something quite different.

Section 3501(b) describes a "right to counsel" during the course of an interrogation, but does not establish a counsel warning requirement as a predicate to admissibility.

[50] *See supra* notes 11-12 and accompanying text.

[51] *Miranda*, 384 U.S. at 469.

[52] *Id.* at 471.

[53] *Id.* at 467. The Court said:

> It is impossible for us to foresee the potential alternatives for protecting the privilege which might be devised by Congress or the States in the exercise of their creative rule-making capacities. Therefore we cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted. Our decision in no way creates a constitutional straightjacket which will handicap sound efforts at reform. Nor is it intended to have this effect. We encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws.

Id.

It does not necessarily follow that effective protection of individual rights can be accomplished only through a series of procedural requirements in the interrogation process. The Supreme Court may ultimately find that in 18 U.S.C. § 3501, Congress has legislated an acceptably structured admissibility analysis procedure.

[54] Justice O'Connor went so far as to make this point twice in a single paragraph.

> The Sixth Amendment right to counsel attaches only at the initiation of adversarial criminal proceedings, and before proceedings are initiated a suspect in a criminal investigation has no constitutional right to the assistance of counsel. . . . The right to counsel established in *Miranda* was one of a "series of recommended 'procedural safeguards' . . . [that] were not themselves rights protected by the Constitution but instead were measures to ensure that the right against compulsory self-incrimination was protected."

Davis v. United States, 114 S. Ct. 2350, 2354 (1994) (citations omitted).

[55] *See supra* note 30.

[56] *Id.*

factor is the warning requirement contained in Article 31 of the UCMJ.[57] While the requirement for *Miranda* warnings may be subject to legislative elimination, in 1951 Congress legislated a separate requirement to advise military suspects about their privilege against self-incrimination.[58] Additionally, because the requirement for Article 31 warnings generally is triggered before *Miranda* warnings would be required,[59] the touchstone for most admissibility determinations by military judges would still be whether a privilege against self-incrimination warning was provided prior to the interrogation.[60]

In addition to Article 31, admissibility of confessions and admissions in military practice is governed by the provisions of the *Manual for Courts-Martial*.[61] Pursuant to the President's authority under Article 36[62] of the UCMJ, the Military Rules of Evidence have evolved over time to include the counsel warning requirements of *Miranda* and its progeny.[63] Accordingly, even if § 3501 ultimately replaces *Miranda* as the standard for admissibility of confessions and admissions in the civilian sector, subjects of custodial interrogation in military investigations still will have to be provided a counsel warning.[64] Of course, whether the Military Rules of Evidence would be changed to conform with § 3501 is open to debate.

Conclusion

When the Supreme Court granted certiorari in *Davis*, the reasonably expected result was a resolution of the split of authority concerning the different approaches to a suspect's ambiguous or equivocal request for counsel. The split of authority was resolved in favor of the threshold standard of clarity for invoking the right to counsel. In applying this rule, however, military practitioners must consider the COMA's apparent preference for clarification as revealed in *Morgan*.

Davis also raises provocative questions about whether the *Miranda* warning requirements should continue to govern the admissibility of confessions and admissions in federal courts. When the appropriate case arises, Justice Scalia's invitation to test the constitutionality of 18 U.S.C. § 3501 undoubtedly will be accepted.

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[57] Article 31(b) provides:

> (b) No person subject to this chapter may interrogate, or request any statement from an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is suspected and that any statement made by him may be used as evidence in a trial by court-martial.

Article 31 does not include a provision concerning the right to consult with counsel during the interrogation process.

[58] Even prior to the enactment of the UCMJ, the military justice system recognized the importance of a warning regarding the privilege against self-incrimination. Article 24 of the Articles of War provided as follows:

> Considering, however, the relation that exists between officers and enlisted men and between an investigating officer and a person whose conduct is being investigated, and the obligation devolving upon an investigating officer to warn the person investigated that he need not answer any question that might tend to incriminate him, confessions made by soldiers to officers or by persons under investigation to investigating officers should not be received unless it is shown that the accused was warned that his confession might be used against him or it is shown clearly in some other manner that the confession was entirely voluntary.

Act of August 29, 1916, Pub. L. No. 64-242, § 3, 39 Stat. 654.

No inflexible warning requirement existed for "military interrogations" prior to the 1948 revision of the Articles of War. *See generally* United States v. Gibson, 3 U.S.C.M.A. 746, 14 C.M.R. 164 (1954). The 1948 revision included a requirement that soldiers charged with an offense be warned about their privilege against self-incrimination. Three years later, with the enactment of the UCMJ, the warning requirement was extended to suspects as well as accused.

[59] Whereas the *Miranda* warning requirement is triggered by custodial interrogation, Article 31 requirements are triggered by official law enforcement or disciplinary questioning of a suspect or an accused. *See generally* United States v. Loukas, 29 M.J. 385 (1990).

[60] MANUAL FOR COURTS-MARTIAL, United States, MIL. R. EVID. 304 (1984) [hereinafter MCM], governs admissibility of confessions and admissions at courts-martial. Currently, Military Rule of Evidence 304 captures, *inter alia*, the warning requirements of *Miranda* and Article 31 and the requirements of due process voluntariness as described in Article 31(d) and Arizona v. Fulminante, 499 U.S. 279 (1991).

[61] MCM, *supra* note 60.

[62] Article 36 provides in part:

> (a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

[63] *See* MCM, *supra* note 60, MIL. R. EVID. 304-05.

[64] *See generally* SALTZBURG ET AL., MILITARY RULES OF EVIDENCE MANUAL xi-xii (3d ed. 1991).

Litigation Division Notes

Release of Information and Appearance of Witnesses, *AR 27-40,* Chapter 7

The much anticipated (at least in the Litigation Division) new *Army Regulation (AR) 27-40* has hit the streets and was effective 19 October 1994![1] *Army Regulation 27-40* contains some significant changes that will streamline our procedures for releasing information or making witnesses available in private litigation or in litigation in which the United States has an interest. The changes can be divided into the following categories: (1) those giving more authority to staff judge advocates (SJAs) or legal advisors; (2) other substantive changes; and (3) procedural changes.

The "Summary of Change" to *AR 27-40* includes the following: "Delegates more authority to the installation level to determine release of information and appearance of witnesses." This is good news for SJAs and other legal advisors because usually they will not have to coordinate with Headquarters, Department of the Army (HQDA) (typically represented by the Litigation Division) when present or former Department of the Army (DA) personnel associated with their installation are requested as witnesses for a court appearance or for a deposition, or when installation records are requested.

An SJA or legal advisor now will be able to approve disclosure of "official information"[2] by present or former DA personnel.[3] Previously, the Litigation Division had to approve requests concerning former DA personnel. Although not required under the new regulation, the SJA or legal advisor always can coordinate with the Litigation Division, or refer a particularly sensitive or difficult case.

Former DA personnel, such as retired officers, sometimes are requested as witnesses in private litigation. For instance, in a recent case involving private litigation pending in a state court, several retired officers, all former commanding generals, were deposed concerning action taken against a former soldier now facing a civil suit by his alleged victim.

In this situation, the SJA or legal advisor now may decide requests for testimony involving official information.[4] The SJA or legal advisor also may *deny* a request for present or former DA personnel to testify as expert witnesses; this is an expansion of authority. An appeal of that decision is made to the Litigation Division, which retains the authority to *approve* requests for expert witnesses in private litigation.[5]

The SJA or legal advisor now may resolve requests for witness interviews or for information in litigation in which the United States has an interest.[6] Under the old *AR 27-40,* these requests had to be forwarded to the Litigation Division if former DA personnel were involved or if the requesting parties were other than the Department of Justice or an attorney representing the United States.

Other substantive changes address omissions in the previous regulation. For instance, the procedure for processing Inspector General records, which are requested for litigation purposes, is now included.[7] Additionally, former DA personnel must obtain approval to provide opinion or expert testimony concerning official information either in private litigation or in litigation in which the United States has an interest for a party other than the United States.[8] The prior regulation only addressed testimony about official information and ignored a separate paragraph on expert testimony. This appeared to be an inadvertent omission. A similar omission occurred in the prior regulation concerning testimony by members of the Army Medical Department (AMEDD) or other qualified specialists. Previously, AMEDD personnel's testimony could not extend to hypothetical questions or to a prognosis. Now the restriction states that AMEDD personnel's testimony "may

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[1] DEP'T OF ARMY, REG. 27-40, LEGAL SERVICES: LITIGATION (19 Sept. 1994) [hereinafter AR 27-40].

[2] "Official information" is defined as:

> All information of any kind, however stored, that is in the custody and control of the Department of Defense (DOD), relates to information in the custody and control of the DOD, or was acquired by DOD personnel as part of their official duties or because of their official status within the DOD while such personnel were employed by or on behalf of the DOD or on active duty with the United States Armed Forces.

Id. glossary, at 50.

[3] *Id.* paras. 7-2b, 7-12a.

[4] *Id.* para. 7-9.

[5] *Id.* para. 7-10a.

[6] *Id.* para. 7-12a.

[7] *Id.* para. 7-2h.

[8] *Id.* para. 7-8b.

not extend to expert or opinion testimony, to hypothetical questions, or to a prognosis."[9]

Some areas have been clarified by procedural changes. For instance, written requests for official information must be submitted at least fourteen days in advance.[10] A request for a witness now must include not only the name of the witness, but also the expected testimony, the time and date, and whether the witness is reasonably available.[11] This issue was raised recently when a civilian lawyer called an installation seeking a contract specialist to testify in private litigation. He needed a response by the next day. Knowledge of the government's contract process was considered official information for a government contract specialist, and the fourteen days written request requirement could not be met. The request was denied.

The new *AR 27-40* has clarified the factors to consider when determining whether official information should be released. Instead of the generic category of "otherwise appropriate," two new specific categories have been included: "(1) Has the requester complied with DA policy governing the release of official documents in paragraph 7-2d above?[12] and . . . (8) Would the disclosure violate any person's expectation of confidentiality or privacy?"[13]

The new *AR 27-40* addresses the status of United States Army Reserve or National Guard personnel who are requested as witnesses. "If their testimony arises from their active duty service, they should be placed on active duty to testify."[14]

And last, but certainly not least (and perhaps most helpful), new sample letters and documents have been included at the end of chapter 7: a *Touhy* compliance letter (figure 7-1); a fact witness approval letter (figure 7-2); an expert witness denial letter (figure 7-3); and a doctor approval letter (figure 7-4).

These are the most significant changes to chapter 7, *AR 27-40*. They should help to expedite and clarify the roles of the SJA, legal advisor, and HQDA concerning the release of information and appearance of present or former DA personnel as witnesses. The Litigation Division remains ready and willing to help with any questions and referrals. Lieutenant Colonel Merck.

Affirmative Litigation Under the Federal Medical Care Recovery Act

The Federal Medical Care Recovery Act (FMCRA)[15] enables the United States to seek recovery for costs of health care provided to military health care beneficiaries for injuries caused by the negligence of a third-party tortfeasor.[16]

To enforce this right of recovery, the United States may intervene or join in any action brought by the injured health care recipient or, if an action is not commenced by the injured party, institute and prosecute independent legal proceedings against the third party who is liable for the injury.[17]

In November 1993, Public Law 103-160 revised 10 U.S.C. § 1095 to provide that money damages recovered under § 1095, *and under the FMCRA*, for treatment provided in Military Treatment Facilities (MTFs), will be deposited in the operating and management budget of the MTF providing the treatment.[18] Prior to this change, recoveries made under the

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[9] *Id.* para. 7-10c (3).

[10] *Id.* para. 7-2d.

[11] *Id.* para. 7-3b.

[12] This paragraph includes the 14-day notice requirement and the requirement for a written specific request for a witness or documents.

[13] AR 27-40, *supra* note 1, para. 7-5b.

[14] *Id.* para. 7-15a.

[15] 42 U.S.C. § 2651 (1982).

[16] 42 U.S.C. § 2651 provides in pertinent part:

> In any case in which the United States is authorized or required by law to furnish . . . care . . . to a person who is injured or suffers a disease, . . . under circumstances creating a tort liability upon some third person . . . to pay damages therefor, the United States shall have the right to recover from said third person the reasonable value of the care and treatment so furnished.

[17] When the injured party has initiated an action against the third-party tortfeasor, the United States also may enter into a representation agreement with the attorney representing the injured party. The agreement will authorize the injured party's attorney to assert the claim of the government as an item of special damages with the injured party's claim or suit. The recovery judge advocate (RJA) handling the claim obtains these agreements. *See* DEP'T OF ARMY, REG. 27-20, LEGAL SERVICES: CLAIMS, para. 14-15 (28 Feb. 1990).

[18] 10 U.S.C. § 1095(g) now states:

> Amounts collected under this section from a third-party payer *or under any other provision of law* from any other payer for the costs of health care services provided at a facility of the uniformed services shall be credited to the appropriation supporting the maintenance and operation of that facility.

(emphasis added)

FMCRA were deposited directly into the general treasury. This new language provides added incentive for the MTF and local claims office to pursue FMCRA cases vigorously at both the affirmative claims stage and in litigation.

If an FMCRA claim cannot be resolved administratively, the RJA handling the claim must act expeditiously to ensure that litigation is initiated in a timely manner. Although the Litigation Division, in conjunction with the Department of Justice and United States Attorneys, is responsible for pursuing FMCRA claims that cannot be resolved administratively, the RJA has the responsibility to prepare a thorough litigation report and ensure that the case is properly forwarded through United States Army Claims Service (USARCS) to the Litigation Division.[19]

In preparing the litigation report, the RJA must first consider what type of action (intervention or independent action) will best serve to assert the government's claim. In cases where the injured party already has commenced an action against the tortfeasor, and where the injured party's attorney refuses to enter into a representation agreement, the United States can intervene and "ride the coattails" of the injured party. In these cases, the United States merely proves its claim for damages after the injured party establishes the negligence of the tortfeasor. Accordingly, the litigation report may be somewhat abbreviated and should concentrate on substantiating amounts to be recovered. Specifically, include copies of all medical records and bills reflecting the reasonable value of the treatment provided by the United States, including certified Military Service Account (MSA) Invoices and Receipts (*Department of the Army Form 3145*).

In cases in which the United States will initiate an independent action, the RJA must prepare a more comprehensive litigation report. Unlike an intervention, in an independent action the United States must, on its own, prove the third-party tortfeasor's negligence, frequently without the help or cooperation of the injured party. In these cases, prepare a litigation report that provides a detailed factual basis for the claim and a theory of recovery under state law, identify witnesses, and gather evidence that will assist the United States in establishing the third-party tortfeasor's negligence.

Finally, as medical care claims litigated under the FMCRA are based in tort, the United States must institute these proceedings within three years after the cause of action accrues.[20] If it appears an FMCRA claim will not be resolved administratively, the RJA must forward a complete litigation report through the USARCS to the Litigation Division no later than six months before the expiration of the statute of limitations. Clearly identify in the litigation report the date on which the statute of limitations expires.

Recovery judge advocates must coordinate early and often with the Affirmative Claims Branch, USARCS and Tort Branch, Litigation Division. Early coordination will ensure a smooth transition from the administrative to the litigation stage and will ensure that FMCRA claims are pursued aggressively at all stages. Captain Sausville.

Environmental Law Division Notes

Recent Environmental Law Developments

The Environmental Law Division (ELD), United States Army Legal Services Agency (USALSA), produces *The Environmental Law Division Bulletin* (*Bulletin*), designed to inform Army environmental law practitioners of current developments in the environmental law arena. The *Bulletin* appears on the Legal Automated Army-Wide Bulletin Board System, Environmental Law Conference, while hard copies will be distributed on a limited basis. The content of the latest issues (volume 2, numbers 3 and 4) is reproduced below:

Fines and Penalties

Resource Conservation and Recovery Act (RCRA) Fees

Some states continue to assess excessive environmental fees against Army installations under the RCRA. The three-part test found in *Massachusetts v. United States*[21] applies to fees assessed under the RCRA. Under the *Massachusetts* test, installations should determine whether: (1) the fee is applied equally to all public and private owners; (2) the charges are based on a "fair approximation" of the use of the system and; (3) the installation will pay more than it will receive in benefits. In *Maine v. Department of Navy*,[22] the court expanded the second part of the test to include the availability of state programs as a benefit for installations. Specifically, the court found that the Navy received a benefit from the availability of Maine's spill response team, even though the Navy never had used that team.

Pursuant to the Anti-Deficiency Act,[23] installations are forbidden from paying all but legally required expenses. Consequently, installations should contest RCRA fees earmarked for

[19] Affirmative claims under $5000 that cannot be resolved administratively may be referred directly to the United States Attorney for the district in which the prospective defendant resides. *See* AR 27-40, *supra* note 1, para. 5-2.

[20] 28 U.S.C. § 2415(b) (1982).

[21] 435 U.S. 444 (1978).

[22] 973 F.2d 1007 (1st Cir. 1992).

[23] 31 U.S.C. § 1341 (1988).

programs from which the Army has not and will not receive any benefit. For example, the Army is presently contesting the payment of underground storage tank (UST) fees to a state that uses a portion of the fee for state-led corrective action. Because the Army performs its own corrective action, it receives no benefit from the availability of state-led corrective action and therefore should not be required to pay the portion of the UST fee targeted for state corrective actions. Additionally, state law effectively bars the Army from participation in this program. Captain Cook.

Overseas

Funding of Final Governing Standards (FGS)

At the request of the Principal Assistant Deputy Undersecretary of Defense for Environmental Security (DUSD(ES)), the Services are in the process of developing a consistent framework for classifying and budgeting overseas environmental requirements mandated by the FGS. While a final policy decision has not been made, the consensus is that funding all FGS requirements in the first few years will not be possible. Expect guidance from the DUSD(ES) on how to classify and prioritize FGS projects for budgeting purposes. Additionally, the planned revision of the Overseas Environmental Baseline Guidance Document (OEBGD), scheduled for Fall 1995, will be done with a view towards developing a consistent budgeting process. Major Fomous.

Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)

Natural Attenuation as a Remediation Alternative

Natural attenuation can be a remedial alternative, provided certain regulatory and legal requirements are first considered and complied with. The National Contingency Plan (NCP) demonstrates a clear bias for treatment, but the 1990 NCP revisions indicate that natural attenuation is a potential remedial alternative. Environmental Protection Agency (EPA) Directive 9234.2-25 (September 1993) provides guidance for evaluating the technical impracticability of ground-water restoration. This nonbinding guidance document indicates that natural attenuation can be a part of a remedy or even a stand-alone remedial alternative, provided that the site-specific analysis supports it. Included in the factors to be considered are biological and chemical degradability, physical and chemical characteristics of the ground water, and physical characteristics of the geological medium. In most cases, however, it will be difficult to force the EPA or states to accept natural attenuation as a remedy because of the subjective nature of the analysis. In the future, the regulated community may propose natural attenuation more often because of the increasing expense of engineered remedies and the projected reduction in restoration funds. Nonetheless, regulators and communities will only accept natural attenuation as a remedy when it meets all applicable, relevant, and appropriate health requirements.

Indemnity Agreements at CERCLA Sites

What can be shared but not given away? Astute environmental lawyers will recognize that the answer is liability under the CERCLA. A federal court has ruled that an indemnity agreement reached in connection with the sale of property is permitted even though the CERCLA says that liability cannot be transferred. In *Harley-Davidson, Inc. v. Minstar, Inc. and AMF, Inc.*,[24] the court ruled that § 107(e), allows for indemnification agreements because such agreements do not result in a responsible party divesting itself of liability, which would not be permitted under the CERCLA, but rather result in a shared liability. The court termed § 107 "notably obscure," and noted that § 107(e) consisted of two contradictory sentences, but dismissed Harley-Davidson's argument against indemnity agreements by asking rhetorically: "What sense would that make?" Of course, this decision is not the first to express confusion over the CERCLA. Mr. Nixon.

Clean Air Act (CAA)

Department of Defense Policy on Transportation Incentives

The Federal Employees Clean Air Incentives Act, Public Law 103-172, effective 1 January 1994, authorizes federal agencies to use appropriated funds to provide military and civilian employees with "transit passes."[25] On 24 October 1994, the Assistant Secretary of Defense for Force Management issued a policy memorandum superseding prior DOD policy memoranda that had precluded providing financial transportation incentives, including transit passes, to DOD civilian employees and military personnel. The new DOD policy allows the Services to provide transportation incentives authorized under Public Law 103-172 "to comply with Federal, state, and local air pollution control and abatement requirements." The policy further provides that installations and activities must provide the same incentive to "all civilian employee and military member recipients." The new policy raises practical and policy issues that must be resolved prior to implementation. Headquarters, Department of the Army, is now developing implementing guidance. Additionally, the Services Steering Committee for CAA Implementation has established a work group to coordinate guidance development among the Services. The best guess is that Army guidance will be finalized sometime during the first quarter of 1995.

[24] No. 90-C-1245 (7th Cir. Nov. 30, 1994).

[25] *See* Environmental Law Division Notes, ARMY LAW., June 1994, at 50.

Air Emissions Standards for Hazardous Waste Treatment, Storage, and Disposal Facilities (TSDFs)

On 6 December 1994, the EPA issued a final rule applicable to TSDFs regulated under the RCRA. The rule requires the control of emissions from tanks, surface impoundments, and containers (twenty-six gallons or more) that receive hazardous waste on or after 5 June 1995. The rule temporarily defers regulation of TSDFs used exclusively for hazardous wastes generated on-site as part of a remedial or corrective action. Additionally, the rule amends 40 C.F.R. § 264.601 to require the incorporation of air emissions control standards in RCRA permits for "miscellaneous units," (*e.g.*, for open burning and detonation of munitions). Finally, the rule imposes emissions control requirements on hazardous waste generators accumulating waste on-site in RCRA permit-exempt tanks and containers pursuant to 40 C.F.R. § 262.34(a) (allowing accumulation of hazardous waste for ninety days or less without a RCRA permit or interim status). The ELD is working with the Office of the Director of Environmental Programs to fully evaluate the impact of this rule on Army TSDFs.

Wood Furniture Manufacturing NESHAP

On 6 December 1994, the EPA proposed National Emission Standards for Hazardous Air Pollutants (NESHAP) for new and existing wood furniture manufacturing operations.[26] Specifically, the proposed rule would regulate finishing, gluing, cleaning, and wash-off operations. The rule is intended to regulate wood furniture manufacturers that are major sources of hazardous air pollutant (HAP) emissions. However, the rule may subject all wood furniture and cabinet making operations on military installations to regulation. Currently, if an installation (considering all HAP emissions within the fenceline of the installation) constitutes a "major source," as defined in CAA § 112(a)(1), then all activities on the installation, regardless of size, are subject to applicable major source NESHAPs. In contrast, small or "area" sources off an installation are not subject to the major source standards. This will be a recurring problem for installations as the EPA promulgates approximately 174 NESHAPs over the next five years. Environmental law specialists are invited to submit comments to the ELD on the wood furniture manufacturing NESHAP and other proposed NESHAPs for incorporation into the Services' comments to the EPA.

Application of the "Source" Definition to Installations

Currently, the EPA and many states view military installations as single sources for permitting under the Prevention of Significant Deterioration (PSD), New Source Review (NSR), and Title V programs. Consequently, installations face more onerous compliance requirements than would apply if the installations could divide into multiple sources. The Army has recommended that the DOD request that the EPA issue formal guidance allowing for the division of installations, in appropriate cases, along functional and control lines. The Army is now coordinating with the other Services on draft guidance for EPA adoption. We anticipate that the DOD will raise the issue with the EPA within the next two months. Major Teller.

RCRA

Update on Munitions Rulemaking

On 12 December 1994, the DUSD(ES) forwarded the DOD's preferred alternative on six issues that the EPA will address in the munitions rule. The Services, supported by their environmental, legal, safety, logistics, and operations communities, had recommended that the DUSD(ES) adopt the DOD Working Group's recommendations. On 13 January 1995, the DOD will brief the EPA regarding the advantages, disadvantages, and costs associated with the alternatives. The DOD's preferred alternatives are as follows:

1. Military munitions should be managed as RCRA-regulated waste upon certification for disposal at a treatment/disposal facility;

2. The DDESB and Service-specific storage standards should be accepted as adequately protective of human health and the environment;

3. The DOD already complies with Department of Transportation and DOD standards for transportation of hazardous materials and explosives; thus, additional RCRA regulation is duplicative;

4. Emergency response actions are first and foremost a safety matter, rather than waste management, and should be exempted from RCRA regulation;

5. With regard to burning of unused propellant bags during the course of legitimate training, the EPA should continue to recognize that use of a manufactured product for an intended purpose is exempt from RCRA;

6. Munitions, including unexploded ordnance, are deposited on a range incident to their normal and expected use as a product, and therefore should not be considered wastes under the RCRA.

As a consequence of a citizens suit filed on 14 December 1994, the EPA now plans to propose the regulation in fall 1995, with promulgation a year later.

[26] 59 Fed. Reg. 62652 (1994).

Update on Munitions Rulemaking

On 13 January 1995, the DOD briefed EPA Assistant Administrator Elliott Laws on the DOD's positions on two of the six issues that the EPA will address in the munitions rule. The DOD focused on the "definition" and range management issues because of the tremendous impact that resolution will have on the Services' ability to perform their missions.

The EPA recently indicated that it favored defining munitions as waste when the munition is removed from storage for the purpose of treatment or disposal. Although the EPA acknowledges that DOD accountability and transportation procedures are adequate and acceptable RCRA substitutes, designation as a waste at this point will implicate offsite waste permit restrictions. The Services are gathering data for an impacts analysis. With respect to ranges, the EPA has indicated that their principal concern is with the clean up of closed or closing ranges. At issue is whether and to what extent RCRA corrective action applies to ranges; applicability of CERCLA; and the extent of the DOD's DERP authority. The ELD is addressing this question.

The DOD Working Group will continue to work with the EPA as they draft the rule. The EPA expects to publish the rule in fall 1995, with promulgation in fall 1996. The rule would be effective in early 1997. Major Bell.

Regional Environmental Offices

In July 1994, the Principal Deputy Under Secretary of Defense for Acquisition and Technology appointed the individual Services as Regional Environmental Security Executive Agents (REAs) for the DOD in the ten EPA regions. The Army is the REA for EPA Regions IV, V, VII, and VIII; the Air Force is the REA for Regions II, VI, and X; and the Navy is the REA for Regions I, III, and IX. Additionally, each Service will have a coordinating function in the regions where it is not the REA.

The REA will be responsible for representing overall DOD interests on issues involving federal, state, and local environmental laws and regulations arising in the region. The DOD, in coordination with the Services, is developing a charter, which will detail how REA regional representatives will perform their functions. Generally, the regional representatives will coordinate environmental issues among the Services, support implementation of DOD environmental policy, and promote outreach and partnering with regulators and the public. More specifically, the regional representatives will promote interservice communication within the region, ensure adequate dissemination and coordination of new legislative and regulatory initiatives and coordinate appropriate responses, identify common approaches to environmental issues, and advise the DOD of issues of national significance arising in their jurisdiction. The individual Services will continue to manage and represent all Service-specific matters.

The Army Environmental Center will implement the DOD guidance within the Army. Although implementation planning is ongoing, current plans are to establish in Fiscal Year (FY) 1995 regional offices at Aberdeen Proving Grounds, Maryland; Atlanta, Georgia; and Denver, Colorado. In FY 1996, an office will be established in Kansas City, Missouri. Attorneys will be assigned to all four offices. Major Saye.

Water Rights

Pursuant to a Memorandum of Understanding between The Judge Advocate General and the Chief Counsel, United States Army Corps of Engineers, dated 21 October 1991, installation staff judge advocates are responsible for rendering advice on legal issues pertaining to the availability and allocation of surface and ground water and the establishment and protection of water rights. Knowing the status of your installation's water rights before, not after, a problem arises is crucial. Significant attorney involvement is necessary to ensure water rights issues are managed properly. You should immediately notify your MACOM environmental law specialist and the ELD of any water law issues that arise.[27] Major Saye.

Air Force Environmental Basic Course

The Air Force has provided the ELD with several slots for the Air Force Basic Environmental Course, 15 to 19 May 1995. This course provides an excellent overview of environmental law. It is held at Maxwell Air Force Base in Montgomery, Alabama. There is no registration fee. Installations are responsible for travel and per diem. Direct requests or inquiries to: Environmental Law Division, Office of The Judge Advocate General, ATTN: Marie Athey, 901 N. Stuart Street, Arlington, Virginia 22203-1837. If you have any questions, please contact Mrs. Athey at (703) 696-1230 or DSN 226-1230; FAX (703) 696-2940 or DSN 226-2940. Mrs. Athey.

[27] For a more detailed discussion of water rights issues on military installations, *see* Environmental Law Note, *Army Water Rights and the Judge Advocate*, ARMY LAW., May 1992, at 64.

TJAGSA Practice Notes

Faculty, The Judge Advocate General's School

Military Administrative Law Notes

Separation For Homosexual Conduct

The current homosexual exclusion policy[1] requires separation for those who engage in homosexual conduct, to include those who merely state "I am gay" or "I am homosexual." Soldiers who are processed for discharge for admissions of homosexuality, however, will be retained if they can demonstrate that they have no propensity or intent to commit homosexual acts.[2]

Although this "demonstration" requirement may place a difficult burden of proof on the self-admitted gay soldier who wants to be retained, the burden is not an impossible one. During 1994, several members of the armed forces admitted to being homosexuals, were processed for separation, and, at an administrative separation board, successfully demonstrated that they had no propensity or intent to commit homosexual acts. The board retained the service members.[3]

How did the service members meet their burden of proof? Although the facts in each hearing were different, the respondents employed some similar tactics. For example, the respondents testified[4] that they had not committed homosexual acts while in the service and had no propensity or intent to commit such acts. Additionally, the respondents used the testimony of peers and superiors to show that their duty performance and credibility was good. Finally, the same peers and superiors testified that presence of self-admitted homosexuals would not interfere with the unit mission or readiness.[5] Major Peterson.

Legal Assistance Items

The following notes advise legal assistance attorneys of current developments in the law and in legal assistance program policies. You may adapt them for use as locally published preventive law articles to alert soldiers and their families about legal problems and changes in the law. We welcome articles and notes for inclusion in this portion of *The Army Lawyer*; send submissions to The Judge Advocate General's School, ATTN: JAGS-ADA-LA, Charlottesville, VA 22903-1781.

Family Law Notes

Property Distribution—The Impact of Premarital Cohabitation

Separation agreement questionnaires and interviews routinely address a multitude of issues relating to a marriage. With regard to property, questions routinely focus on differentiating separate from marital or community property, and determining an appropriate date of valuation.[6] A recent New Jersey case, *McGee v. McGee*, suggests that our inquiry also should extend to periods of premarital cohabitation.[7]

At trial, *McGee* was an apparently straightforward divorce case involving a four-year marriage between two previously divorced parties. The parties' joint assets, including a marital residence, were simply valued as of time of distribution and divided. The court denied the wife's petition for permanent alimony in favor of six months of rehabilitative alimony.

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[1] 10 U.S.C. § 654 (West Supp. 1994).

[2] More specifically, "(b) A member of the armed forces shall be separated from the armed forces . . . if one or more of the following findings is made and approved . . . (2) That the member has stated that he or she is a homosexual or bisexual, or words to that effect, unless there is a further finding, . . . that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts." *Id.* "Propensity" is not defined in the statute. The Department of Defense Directives define "propensity to engage in homosexual acts" as "more that an abstract preference or desire to engage in homosexual acts; it indicates a likelihood that a person engages in or will engage in homosexual acts." *See, e.g.*, DEP'T OF DEFENSE, DIRECTIVE 1332.30, SEPARATION OF REGULAR COMMISSIONED OFFICERS (5 Feb. 1994), encl. 4, para. B.5.d.

[3] This information was obtained from The Office of The Judge Advocate General. Administrative board hearings are not normally reduced to a verbatim record. Additionally, the names of the respondents have been withheld for privacy reasons.

[4] Some of the statements were written while some were unsworn.

[5] See Message, Headquarters, Dep't of Army (DAPE-MP), subject: Administrative Separation for Homosexual Conduct (010115Z Mar 94). Paragraph 3.B. contains a nonexclusive listing of the types of evidence that a self-admitted homosexual respondent may use to rebut the presumption of past or future homosexual acts. Interestingly, statements about the impact of a self-admitted homosexual on the morale and discipline of the unit are not mentioned in this listing and arguably are irrelevant to the separation proceedings.

[6] Dependent on state law, this may lead to valuation of assets on the date of separation, the date of filing for divorce or legal separation, or the actual divorce date.

[7] 21 Fam. L. Rep. (BNA) 1053 (N.J. Super. Ct. 1994).

At issue on appeal was whether a lengthy premarital relationship and property transactions that occurred during that period should have affected property distribution and alimony. Finding for the wife, the appellate court remanded the case to the trial court to consider the "complete factual scenario surrounding the parties' lengthy relationship."[8] The trial court was to reassess the wife's share in the equity of the marital residence, and consider permanent alimony as an appropriate alternative to rehabilitative alimony.

McGee expressly clarified that, under New Jersey law, the point in time when a ceremonial marriage is performed should not be seen as a barrier for considering the full impact of a relationship. Premarital periods are not ignored, but instead considered as encompassing a "shared enterprise of marriage beginning before the ceremonial act or as one in which equitable remedies such as constructive trust, quasi contract or quantum meruit are invocable for equitable reasons."[9]

Coming from a noncommon law marriage state,[10] *McGee* reflects a predisposition towards equity in the family law arena. Although this decision may largely be the result of exceptional facts, it should sensitize practitioners to consider a client's entire *relationship*, and not just the periods of formal marriage.

Legal assistance practitioners may wish to focus at least part of their questionnaires or checklists to a discussion of relationships, and not just the period of marriage. Questionnaires that focus on *marriage* alone may infer a complete lack of relevance to important facts that unwitting clients fail to mention and unsuspecting attorneys fail to consider. Major Block.

Smoking and Child Custody Determinations—Part II

A prior practice note emphasized that many factors may be considered in reaching a custody decision that is in the best interests of a child.[11] By way of example, the note mentioned a New Jersey court case that held smoking as a factor that a court may consider in awarding custody.[12] A more recent New York decision indicates that smoking may be an overwhelming factor in exceptional circumstances.[13]

In re Lizzio addressed a petition to transfer custody from a smoking mother to a nonsmoking father. Based solely on the health risk to one of the children associated with smoking, the court transferred custody of two children to their nonsmoking father.[14]

Although *Lizzio* involved a child that was allergic to smoke, the significance of the court's willingness to transfer custody based on smoking alone should not be overlooked. As lawmakers continue to acknowledge the dangers of secondhand smoke by expanding the ban on public smoking, the extension of similar protection to children through custody determinations may become more prevalent. Major Block.

Client Services—Military Law Note

Reports of Survey: An Overlooked Limit on Liability for Loss or Damage to Government Property

Reports of survey frequently document facts sufficient to demonstrate that a soldier's simple negligence is the proximate cause of loss or damage to government property. Coupled with some form of responsibility, these facts form the basis for imposing liability for the loss.[15] Although most attorneys understand that liability generally is limited to one month's base pay,[16] others may fail to appreciate the dramatic limit on liability that valuation of the loss or damage may provide.

Loss of government property is in many cases valued by a mechanical use of depreciation. Damage is routinely valued using estimates of repair. In both cases, the regulatory preference for the actual value of loss or damage is ignored.[17] Frequently, this works to the significant detriment of the individual. For example, it is not unusual to see reports of survey for electronics or computer equipment, or for property that is known to be damaged or no longer useful. Much of this property has little or no value at the time of the loss. Sim-

[8] *Id.* at 1054.

[9] *Id.*

[10] N.J. Stat. § 37:1-10.

[11] *See* Family Law Note, *Smoking and Child Custody Determinations*, ARMY LAW., Jan. 1995, at 68.

[12] *Id.* (discussing Unger v. Unger, 20 Fam. L. Rep. (BNA) (N.J. Super. Ct. 1994)).

[13] *In re Lizzio*, 21 Fam. L. Rep. 1058 (BNA) (N.Y. Fam. Ct. 1994).

[14] *Id.*

[15] DEP'T OF ARMY, REG. 735-5, PROPERTY ACCOUNTABILITY: POLICIES AND PROCEDURES FOR PROPERTY ACCOUNTABILITY, para. 13-30 (28 Feb. 1994).

[16] *Id.* para. 13-42b.

[17] *Id.* app. B.

ilarly, it is not unusual for estimates of repair to deviate significantly from the actual cost of repair.

Legal assistance attorneys should discuss at length with the client the nature of the property lost or damaged. Valuation seemingly at odds with actual value should be questioned and reasonably available alternatives obtained. Evidence of alternative value may be readily available from commercial catalogs, local repair and paint shops (for vehicle accidents), or from other Army personnel (*e.g.*, warrant officers or procurement specialists).

Reports of survey are an integral component of the Command Supply Discipline Program, but imposition of liability is a deterrent, not a punishment.[18] Legal assistance practitioners frequently will find that valuation is an effective means of legitimately limiting this liability. Major Block.

Soldiers' and Sailors' Civil Relief Act Note

Tolling of Statutes of Limitations

Section 525 of the Soldiers' and Sailors' Civil Relief Act (SSCRA) tolls all statutes of limitations for the duration of a soldier's military service.[19] Three recent cases construing the statute provide judge advocates with important practice reminders. The cases reveal how the SSCRA relates to other federal statutes of limitations. They also reveal what time limits the SSCRA tolls and how to compute the tolling. A common thread in all three cases is that the SSCRA means *exactly* what it says!

In *Detweiler v. Pena*, the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) considered whether the SSCRA tolling provision applies to the three-year statute of limitations for bringing an appeal before the Board for Correction of Military Records (BCMR).[20] Detweiler was a former Coast Guard officer. In 1985 his commander gave him an Officer Efficiency Report (OER) that was less complimentary than Detweiler's previous two reports. In 1990, the Coast Guard nonselected Detweiler for promotion. The next year, Detweiler applied to the BCMR to have the 1985 OER removed from his file. The BCMR denied his application, holding that the statute of limitations barred his appeal.[21] The District Court denied Detweiler's plea for relief. The D.C. Circuit reversed and remanded the case to the BCMR for further proceedings. Overruling several older cases, the D.C. Circuit held that the SSCRA tolling provision *does* apply to BCMR proceedings. Citing the United States Supreme Court case of *Conroy v. Aniskoff*,[22] the D.C. Circuit noted that "[§ 205] tolls 'any' limitations period . . . in 'any' law for the bringing of 'any' action before 'any' court, board or bureau."[23]

The D.C. Circuit ruled in favor of remand, but did not rule out application of the equitable principle of laches. Laches remains a viable theory that the government (or any opponent) may assert against a soldier.[24] According to the D.C. Circuit, laches requires a showing of unreasonable delay plus prejudice to the opposing party.[25] The court emphasized that laches may apply *within* the time period ordinarily covered by the statute of limitations. Therefore, legal assistance practitioners must advise clients of the possible application of laches as well as the effect of § 525.

While *Detweiler* discussed the application of § 525 to case initiation, in *Dellape v. Murray*, the Commonwealth Court of Pennsylvania recently decided that the tolling provisions did not affect the running of time limits *after* filing the case[26] On July 1, 1989, the alleged tort occurred and on March 29, 1990, Dellape filed suit against Murray. The court of common pleas dismissed the suit for failure to prosecute on August 13, 1991.[27] From September 27, 1990 to June 13, 1991, Murray's codefendant, Johnson, was on active duty. Dellape attempted to refile the suit on August 28, 1991, beyond the two-year

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[18] *Id.* para. 12-1a.

[19] 50 U.S.C.A. app. § 525 (West 1990 & West Supp. 1993). The statute states as follows:

> The period of military service shall not be included in computing any period now or hereafter to be limited by any law, regulation, or order for the bringing of any action or proceeding in any court, board, bureau, commission, department, or other agency of government by or against any person in military service. . . .

Id.

[20] Detweiler v. Pena, 38 F.3d 591, 592 (D.C. Cir. 1994). The BCMR statute of limitations is located at 10 U.S.C. § 1552(b) (Supp. IV 1992).

[21] *Detweiler*, 38 F.3d at 592.

[22] 113 S. Ct. 1562 (1993).

[23] *Detweiler*, 38 F.3d at 593.

[24] *Id.* at 595.

[25] *Id.*

[26] 1994 WL 684674, at *3 (Pa. Commw. Ct. 1994).

[27] *Id.* at *1.

statute of limitations.[28] The court rejected the argument that the statute of limitations had been tolled during Johnson's active duty and dismissed the suit. Holding that the statute was not tolled *after* the filing of the initial suit, the court clarified that the SSCRA is a "shield" for soldiers, not dilatory plaintiffs.[29]

In November 1994, a federal court in Kansas determined that the SSCRA "shield" *only* extends over the period of service. *Hamner v. BMY* applied the SSCRA to a tort claim filed by a former soldier two years and one day after his discharge.[30] Under Kansas law, the statute of limitations for tort claims is two years.[31] Kansas courts apply what the court termed the "anniversary date" method to compute the limitations period.[32] Under this method, the statute period begins the day after the tort occurs and ends two years later. Thus, as the court described, if a tort occurs on September 10, 1990, the plaintiff must file suit no later than midnight on September 10, 1992.[33]

Hamner asserted that the tort occurred on November 9, 1988, while he was on active duty. He received his discharge on July 20, 1992, and filed suit on July 21, 1994.[34] The court found that the statute of limitations was tolled by the SSCRA to July 20, 1992, the date of discharge. Applying the "anniversary date" method, the court held that Hamner failed to file his suit by July 20, 1994 and dismissed his case.

These cases illustrate two points for judge advocates. First, you may expect a court to apply the SSCRA strictly according to its terms. Second, it is essential to review *state* law regarding statutes of limitations to see if and how the statute will apply to the soldier's case. Major McGillin.

International and Operational Law Notes

Intelligence Law Update

United States Counterintelligence Community

Last May, President Clinton signed Presidential Decision Directive 24 (PDD 24) directing that steps be undertaken to improve United States counterintelligence effectiveness.[35] In that directive, he created the National Counterintelligence Policy Board (abolishing the old National Advisory Group for Counterintelligence).[36] The new board will "consider, develop and recommend for implementation to the Assistant to the President for National Security Affairs policy and planning directives for U.S. counterintelligence."[37] The board also will give the National Security Advisor an annual report on United States counterintelligence effectiveness.[38]

Membership will consist of representatives from several executive agencies to include the Director of Central Intelligence/Central Intelligence Agency (DCI/CIA); the Federal Bureau of Investigation (FBI); the Department of Defense (DOD); and the Departments of State and Justice.[39] The DCI

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[28] *Id.* at *1-2.

[29] *Id.* at *3.

[30] 1994 WL 679373 (D. Kan. 1994).

[31] KAN. STAT. ANN. § 60-513(a)(4), *cited in Hamner*, 1994 WL 679373 at *1.

[32] *Hamner*, 1994 WL 679373 at *2.

[33] *Id.*

[34] *Id.* at *2-3.

[35] Presidential Decision Directive/NSC-24, The White House (May 3, 1994) [hereinafter PDD 24]. President Clinton states in the directive:

> [R]ecent events at home and abroad make clear that numerous threats to our national interests—terrorism, proliferating weapons of mass destruction, ethnic conflicts, sluggish economic growth—continue to exist. . . . In this context, it is critical that the U.S. maintain a highly effective and coordinated counterintelligence capability.

The press release issued on May 3, 1994 regarding PDD 24 declares:

> The President's decision to take these significant steps of restructuring U.S. counterintelligence policy and interagency coordination, followed a Presidential Review of U.S. counterintelligence in the wake of the Aldrich Ames espionage investigation. The President, in issuing this directive, has taken immediate steps to improve our ability to counter both traditional and new threats to our Nation's security in the post-Cold War era.

[36] *Id.* at 2.

[37] *See id.* appended fact sheet at 1.

[38] *Id.* at 3.

[39] *Id.* at 2-3.

will appoint the chairman and the chair will rotate among the CIA, FBI, and DOD.[40]

The President also directed that a National Counterintelligence Center be created within ninety days of the issuance of PDD 24.[41] The center's purpose will be to implement interagency counterintelligence activities.[42] Directorship of the center also will rotate among the CIA, FBI, and DOD.[43]

Intelligence Authorization Act, Fiscal Year 1995

On 14 October 1994, President Clinton signed into law the Intelligence Authorization Act for fiscal year 1995.[44] Among the provisions of note are:

> Directing the President to issue an executive order regarding the classification and declassification of information;[45]
>
> Requiring the President to develop uniform provisions for access to classified information within the executive branch;[46]
>
> Requiring the President to report to Congress on the roles and capabilities of the United States Intelligence Community;[47] and
>
> Amending the Foreign Intelligence Surveillance Act, providing for a procedure, similar to those regarding electronic surveillance, for physical searches with a foreign intelligence purpose.[48]

Congress to Reassess United States Intelligence Community

Members of a congressionally mandated presidential commission are ready to evaluate the role of the United States intelligence community in the post-Cold War world.[49] The commission was established as part of the Intelligence Authorization Act for fiscal year 1995.[50] Chaired by Les Aspin, Chairman of the Foreign Intelligence Advisory Board, the commission consists of seventeen panel members.[51] They will make recommendations to the President and Congress in areas that need reform.[52] This is the first time since World War II that the United States Intelligence Community has been reassessed to this extent.[53] The commission has until 1 March 1996 to submit a report to the President and will disband thirty days after submission of the final report.[54] Lieutenant Colonel Crane.

Criminal Law Notes

New Rules for Admission of Negative Urinalysis Results

In *United States v. Johnston*,[55] the COMA changed the rules on the admissibility of "negative" urinalysis results. A

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[40] *Id.* at 2.

[41] *Id.* at 3.

[42] *Id.* appended fact sheet at 3.

[43] *Id.* at 3.

[44] Pub. L. No. 94-359, 108 Stat. 3423 (1994).

[45] *Id.* § 701.

[46] *Id.* § 801.

[47] *Id.* § 809.

[48] *Id.* § 807.

[49] Note, 16 A.B.A. NAT'L SECURITY L. REP. 10 at 6 (A.B.A. Standing Comm. Law & Nat. Sec. 1994), [hereinafter NATIONAL SECURITY LAW REPORT].

[50] Title IX, Pub. L. No. 94-359, 108 Stat. 3423 (1994).

[51] *Id.* § 902; *see also Panel Head Presses Clinton, CIA to Close Gap*, WASH. POST, Dec. 3, 1994, at A11; *Congress Decides to Conduct Study of Need for CIA*, N.Y. TIMES, Sept. 28, 1994, at 1.

[52] Pub. L. No. 94-359, § 903, 108 Stat. 3423 (1994).

[53] NATIONAL SECURITY LAW REPORT, *supra* note 49, at 6.

[54] Pub. L. No. 94-359, §§ 904(c), 908 (1994).

[55] 41 M.J. 13 (C.M.A. 1994). On 5 October 1994, the National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663, 2831 (1994) (to be codified at 10 U.S.C. § 941) changed the name of the United States Court of Military Appeals (COMA) to the United States Court of Appeals for the Armed Forces. The Army Court of Military Review was renamed the Army Court of Criminal Appeals. The practice notes will use the title of the court that was in place when the decision was published.

negative urinalysis result is one that does not contain drugs or drug metabolites at a level above the DOD cutoff levels for reporting a sample positive, although it may contain some traces of drugs or drug metabolites.[56] Under prior case law, the government was prevented from using such negative results—even in rebuttal—because such use violated the directive governing the DOD drug testing program.[57] *Johnston* overruled this case law and held that the Military Rules of Evidence (MRE) should be used to determine the admissibility of such negative test results.[58]

In *Johnston*, the accused was convicted of use of marijuana on 1 September 1990.[59] The only evidence that the government produced concerning this offense was the testimony of Staff Sergeant Paul Robertson, an Air Force Office of Special Investigations undercover source, who said that he saw the accused inhale from a marijuana cigarette three or four times.[60]

The defense presented evidence of the accused's good military character and offered the results of a negative RIA test of a urine sample the accused provided on 4 September 1990, three days after his alleged use.[61] This test revealed the presence of some level of marijuana metabolite, although below the level considered positive for reporting purposes. Prior to entering pleas, the defense moved *in limine* to suppress a government explanation of the test results. The defense wanted to introduce the negative test results but prevent the government from explaining that the test actually revealed the presence of marijuana.[62] The defense relied on *United States v. Arguello*.[63] In *Arguello*, the COMA held that the military judge erred by allowing the government to rebut negative RIA test results, introduced by the defense, with evidence that the results actually indicated the presence of some marijuana metabolites in the accused's urine, because this rebuttal violated the DOD drug testing regulation and service regulations.[64]

The government in *Johnston* subsequently moved *in limine* to prevent the defense from offering the negative test results altogether. The trial judge granted the government's motion, finding that experts in the field did not reasonably rely on RIA tests for determining the presence or absence of drug metabolites.[65] The trial judge ruled that the marginal relevance of the test was substantially outweighed by the risk of misleading the members under MRE 403.[66]

Writing the majority opinion in *Johnston*, Judge Crawford affirmed the trial judge's decision to exclude the negative test result altogether. She overruled *Arguello*, finding that it abandoned the MRE, relying instead on service directives to exclude otherwise reliable evidence. She held that the MRE should govern the admissibility of negative test results, and concluded that the trial judge did not abuse his discretion in excluding the negative test results under the MRE.[67] Judges Gierke and Cox concurred.[68]

Chief Judge Sullivan and Judge Wiss both wrote dissenting opinions. Chief Judge Sullivan stated that the accused had a

[56] Drug testing laboratories use these cutoff levels to determine how to report the results of a test to the unit that provided the sample. If a test reveals a level of drugs or drug metabolites *below* the cut off, the laboratory will report that the sample tested *negative* for the presence of drugs; if the test reveals a level *at or above* the cut off, the laboratory will report that it tested *positive*. These cut offs are expressed in nanograms per milliliter (ng/ml). Different cutoff levels are established for the initial radioimmunoassay (RIA) test and the confirmation gas chromatography/mass spectrometry (GC/MS) test conducted by the laboratories. DEP'T OF DEFENSE, DIRECTIVE 1010.1, DRUG ABUSE TESTING PROGRAM, encl. 3 (28 Dec. 1984) [hereinafter DOD DIR. 1010.1]. For example, the cutoff level for marijuana metabolites is 50 ng/ml for the RIA test and 15 ng/ml for the GC/MS test. Memorandum, Assistant Secretary of Defense (Health Affairs), subject: Drug Urinalysis Testing Levels (8 Mar. 1991) [hereinafter Memorandum].

[57] United States v. Arguello, 29 M.J. 198 (C.M.A. 1989). The directive governing the DOD drug testing program is DOD DIR. 1010.1, *supra* note 56.

[58] *Johnston*, 41 M.J. at 16.

[59] *Id.* at 14. The accused also was convicted of use of marijuana on 27 July 1990.

[60] *Id.*

[61] *Id.* The RIA test is the initial screening test performed on all urine samples received by military drug testing laboratories. If this test is positive, a confirmation test using GC/MS is performed. *See* DOD DIR. 1010.1, *supra* note 56, encl. 3.

[62] *Johnston*, 41 M.J. at 14.

[63] 29 M.J. 198 (C.M.A. 1989).

[64] *Id.* The COMA held that the government rebuttal violated *DOD Directive 1010.1*, which states that details concerning negative test results generally will not be reported. DOD DIR. 1010.1, *supra* note 56, encl. 3, para. H. The COMA also discussed the denial of the accused's due process rights which resulted when the government destroyed the accused's urine sample. Under *DOD Directive 1010.1*, all urine samples that yield negative test results are destroyed. *Id.* encl. 3, para. I. However, the COMA found that it need not decide the case based on the denial of the accused's constitutional due process rights, given the regulatory violation. *Arguello*, 29 M.J. at 203.

[65] *Johnston*, 41 M.J. at 14-15.

[66] MANUAL FOR COURTS-MARTIAL, United States, MIL. R. EVID. 403 (1984) [hereinafter MCM].

[67] *Johnston*, 41 M.J. at 16.

[68] *Id.* at 17. Judge Cox wrote a separate concurring opinion.

codal and constitutional right to introduce the negative test results, that the results should not have been excluded under MRE 403, and that they were crucial to the defense.[69] Judge Wiss also found that the negative test results were crucial defense evidence and should not have been excluded under MRE 403.[70]

Johnston leaves open the question of whether negative test results may be introduced under any circumstances at a court-martial.[71] Under *Johnston*, negative test results are arguably admissible if they are reliable and relevant and their probative value is not substantially outweighed by the danger of misleading the members.[72] There are at least two situations where this may be true: (1) where the defense offers an RIA test result showing *no* traces of drug metabolite and (2) where a "negative" result was obtained during a GC/MS, the confirmation test used by military drug testing laboratories.[73]

In the case of a negative RIA test showing no traces of drug metabolites, the defense would first have to produce expert testimony to show that RIA tests are reliable. The MRE do not require that expert testimony be based on principles "generally recognized in the scientific community."[74] However, MRE 702[75] provides that expert testimony is admissible if it will "assist the trier of fact" and MRE 703[76] requires that an expert rely on data "reasonably relied upon by experts in the particular field." This suggests that some acceptance of scientific evidence by experts in the field is required.[77]

Given the COMA's approval of the trial judge's findings in *Johnston*, the defense may find it difficult to demonstrate the scientific acceptance or reliability of an RIA test. However, even in *Johnston*, the trial judge conceded that the negative RIA test was marginally relevant and, therefore, apparently somewhat reliable.[78]

The defense also would have to demonstrate that the probative value of the RIA test results is not substantially outweighed by the danger of misleading the members under MRE 403. This would be easier to do if the RIA test showed no traces of drug metabolite, because there would be no danger of confusion as to whether the results actually indicated drug use.

In the case of a negative GC/MS test, either the government or the defense should be able to demonstrate the reliability of a GC/MS test, because positive GC/MS tests routinely are introduced at courts-martial to prove drug use.[79] Additionally, the probative value of GC/MS test results would probably not be substantially outweighed by the danger of confusing the members under MRE 403, because the reliability and, therefore, probative value,[80] of a GC/MS test is much greater than that of an RIA test.[81]

In *Johnston*, the COMA also left open the question of whether the government's use of negative test results in its

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[69] *Id.* at 18-19 (Sullivan, C.J., dissenting).

[70] *Id.* at 21 (Wiss, J., dissenting).

[71] *But see id.* at 19 (Sullivan, C.J., dissenting). In Chief Judge Sullivan's view, the majority opinion in *Johnston* permits the exclusion of all negative urinalysis test results.

[72] Judge Crawford, in her majority opinion in *Johnston*, held that the trial judge did not abuse his discretion by excluding the negative test results, given his concerns over their relevance, reliability, and danger of confusion. *Id.* at 16.

[73] This test result is possible, although unusual. The negative GC/MS test would have to be preceded by a positive RIA test, because only those samples that yield a positive RIA test result are subjected to the GC/MS test. *See* DOD DIR. 1010.1, *supra* note 56. Although the cutoff levels for the RIA test are usually higher than those for the GC/MS test, it is still possible for a sample to yield a positive result on the RIA test and a negative result on the GC/MS test. The RIA test measures the presence of a number of metabolites, while the GC/MS test only measures the presence of one specific metabolite. For example, a urine sample could contain more than 50 ng/ml (the RIA cut off for marijuana metabolites) of the marijuana metabolites tested for in the RIA test, but less than 15 ng/ml (the GC/MS cut off for marijuana metabolites) of the specific marijuana metabolite tested for in the GC/MS test. Such a sample would yield a positive RIA test result but a negative GC/MS test result. *See* Memorandum, *supra* note 56.

[74] In United States v. Gipson, 24 M.J. 246 (C.M.A. 1987), the COMA rejected the "general acceptance" test of United States v. Frye, 293 F.2d 1013 (D.C. Cir. 1923), as an independent controlling standard for the admission of scientific evidence. *See also* Daubert v. Merrell Dow Pharmaceutical, 113 S. Ct. 2876 (1993), which rejected the *Frye* test as the sole basis for determining the admissibility of scientific evidence under the *Federal Rules of Evidence*.

[75] MCM, *supra* note 66, MIL. R. EVID 702.

[76] *Id.* MIL. R. EVID 703.

[77] *See* STEPHEN A. SALTZBURG ET AL., MILITARY RULES OF EVIDENCE MANUAL 726 (3d ed. 1991).

[78] United States v. Johnston, 41 M.J. 13, 15 (C.M.A. 1994). *See also* United States v. Gipson, 24 M.J. 246 (C.M.A. 1987) in which the COMA stated, "For any evidence to have logical relevance . . . —scientific evidence included—some degree of reliability is implicit." *Id.* at 251.

[79] United States v. Harper, 22 M.J. 157 (C.M.A. 1986).

[80] In *Gipson*, the COMA stated that the degree of acceptance in the scientific community and similar factors indicating reliability may be used as tools in determining the probative value of scientific evidence. *Gipson*, 41 M.J. at 252.

[81] In *Johnston*, 41 M.J. at 14-15, the trial judge ruled that the RIA test was not reasonably relied on by experts in the field to determine the presence or absence of marijuana metabolites *unless* used in conjunction with the GC/MS test.

case in chief would be barred by some other rule of law.[82] Arguably, the directive governing the DOD drug testing program would preclude the government from using negative test results, because it provides that details on negative test results ordinarily will not be reported.[83] However, violation of a regulation usually does not require suppression of evidence.[84] Therefore, in an appropriate case, the government may be able to use negative test results in its case in chief.

If the defense or government successfully introduce negative urinalysis test results at a court-martial, *Johnston* suggests that the other side should be allowed to present rebuttal evidence explaining the results. The majority in *Johnston* criticized *Arguello* because it prohibited the government from presenting evidence to rebut the negative test results introduced by the defense and, therefore, overlooked the truth-finding purpose of courts-martial.[85] Even the dissenting judges in *Johnston* conceded that the government should be able to rebut negative test results introduced by the defense.[86]

For many years the courts have applied a higher standard to the government than the defense in urinalysis cases.[87] *Arguello* is an example; in *Arguello* the government was prevented from offering evidence that otherwise would have been admissible under the MRE. In *Johnston*, by overruling *Arguello*, the COMA has retreated somewhat from this trend.[88] *Johnston* is an effort to get "back out of the wilderness and on the beaten path" of the MRE.[89] This effort will make it more difficult for the defense to introduce negative urinalysis test results at courts-martial. It also may have opened the door for the government to introduce negative test results in appropriate cases. Major Masterton.

Posttrial Matters: On Your Client's Behalf?

Once again the COMA has reminded defense counsel of obligations with regard to posttrial matters. In *United States v. Dresen*,[90] counsel submitted matters on behalf of the client, however, the relief requested was not what the accused wanted. The case illustrates the importance of discussing all posttrial matters with the accused and securing the accused's consent to anything submitted.[91]

Technical Sergeant (TSGT) Dresen, who had over eighteen years of service, was convicted of willfully disobeying an officer and using marijuana on divers occasions.[92] His sen-

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[82] *Id.* at 16-17.

[83] DOD Dir. 1010.1, *supra* note 56, encl. 3, para. H.

[84] United States v. Caceres, 440 U.S. 741 (1979) (violation of Internal Revenue Service regulation on monitoring and tape recording conversations did not require exclusion of evidence where regulation was not mandated by Constitution or statute); United States v. Thompson, 33 M.J. 218, 221 (C.M.A. 1991), *cert. denied* 112 S. Ct. 972 (1992) (violation of Posse Comitatus Act or regulation does not necessarily require exclusion of evidence). The majority opinion in *Johnston*, 41 M.J. at 17, cited both of these cases immediately after the court stated that it need not decide whether government use of negative test results in its case in chief would be barred by some other rule of law.

[85] *Johnston*, 41 M.J. at 15.

[86] Chief Judge Sullivan stated in his dissent that once the defense introduced negative test results, the government could have explained them using expert testimony. *Id.* at 18. Judge Wiss stated in his dissent that had the trial judge allowed the defense to introduce the negative test results, the prosecution would not have been barred from offering expert witnesses to explain the results. *Id.* at 21.

[87] *See, e.g.*, United States v. Konieczka, 31 M.J. 289 (C.M.A. 1990) in which the COMA held that an installation alcohol and drug control officer's decision to forward a urine sample for further testing after a negative prescreening test constituted an unreasonable inspection, because his decision violated drug testing regulations. Ordinarily, violations of regulations do not require exclusion of evidence. *Id.* at 299 (Cox, J., dissenting); United States v. Pollard, 27 M.J. 376 (C.M.A. 1989); *supra* note 84 and accompanying text. *See also, e.g.*, United States v. Manuel, 39 M.J. 1107 (A.F.C.M.R. 1994), where the Air Force Court of Military Review (AFCMR) held that the government's accidental destruction of the accused's positive urine sample required suppression of the test results and reversal of the accused's conviction. Ordinarily, government destruction of evidence will result in suppression only if the evidence was apparently exculpatory at the time of destruction or the government acted in bad faith. California v. Trombetta, 476 U.S. 479 (1984); Arizona v. Youngblood, 488 U.S. 51 (1988).

[88] Prior to *Johnston*, the COMA already had declined to apply *Arguello* to the Coast Guard. In United States v. Ryder, 39 M.J. 454 (C.M.A. 1994), the COMA held that admission of a test result below the cutoff level in a Coast Guard case was not plain error. However, the Coast Guard is not governed by *DOD Directive 1010.1*. The applicable Coast Guard regulation provides that a test result below the cutoff level is evidence of drug presence that may be used to corroborate other evidence of drug use, although it will not alone support a conclusion of drug use. *Id.* at 456.

[89] *Johnston*, 41 M.J. at 15 (quoting from the oral argument of the government).

[90] 40 M.J. 462 (C.M.A. 1994).

[91] Securing the client's consent is not always possible, for example, where the client has been tried in absentia. Counsel still has the obligation to represent the client zealously during the posttrial phase. In United States v. Collins, No. 9302144 (A.C.C.A. 9 Dec. 1994), a defense counsel representing an absent without leave accused submitted matters suggesting that he was doing so only to satisfy his obligations under the law and that clemency was highly improbable. The Army Court of Criminal Appeals criticized counsel's use of "intemperate language," pointing out that it undercut his arguments for clemency. *Id.*

[92] *Dresen*, 40 M.J. at 464. The COMA referred to the accused's *eighteen* years of service, while the AFCMR opinion mentioned his *nineteen* years of service. *See* United States v. Dresen, 36 M.J. 1103, 1112 n.13 (A.F.C.M.R. 1993).

tence included a bad-conduct discharge, confinement for one year, forfeiture of $500 pay per month for six months, and reduction to the lowest enlisted grade.[93] Although the accused represented himself during the trial, defense counsel was appointed to handle posttrial matters.[94] The Staff Judge Advocate's (SJA) Recommendation advised the convening authority to disapprove the finding of guilty as to the disobedience charge because the charge had been improperly referred to trial. As part of her posttrial matters, the defense counsel requested a rehearing on the sentence, based on an approved finding of guilty as to only one charge.[95] In the alternative, she requested approval of the bad-conduct discharge but substantial reduction in the confinement and forfeitures.[96]

Taking the SJA's advice, the convening authority disapproved the finding of guilty on the disobedience charge. He approved the marijuana conviction, reduced the confinement to ten months and approved the rest of the sentence.[97]

On appeal, the accused argued that he had not consented to the matters submitted on his behalf.[98] Specifically, he would have sought to avoid discharge at all costs. The AFCMR found error in the defense counsel's actions but concluded that the accused suffered no prejudice because a bad-conduct discharge would have been adjudged on the basis of the marijuana uses alone. The AFCMR then reassessed the sentence by approving only the discharge and reduction to E-1.[99]

The COMA granted review to determine whether the AFCMR erred in finding "no prejudice" to the accused and in not returning the case for a new action by the convening authority. The COMA agreed with appellant that he had suffered prejudice from defense counsel's inadequate representation and that a new action was in order.[100]

In arriving at its holding, the COMA first noted that a defense counsel can articulate an accused's preference for a particular form of punishment over another form.[101] Counsel cannot ask a court-martial for a punitive discharge, however, unless the accused desires one.[102] Similarly, the counsel who makes such a request during the posttrial phase must ensure that the client agrees. In *Dresen*, counsel's advocacy for modification of the sentence contrary to her client's wishes constituted error.[103]

In her posttrial affidavit, the defense counsel explained that she thought it unlikely that the convening authority would disapprove the discharge and therefore encouraged the accused to request relief which might reasonably be granted.[104] The COMA was unswayed by this argument, pointing out that the accused's dedicated years of service, his psychological dependence on marijuana, and a previously approved administrative discharge for an earlier urinalysis were factors that may have persuaded the convening authority to disapprove the discharge.[105] The COMA concluded that appellant lost a very

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[93] *Dresen*, 40 M.J. at 463.

[94] *Id.* at 465.

[95] *Dresen*, 36 M.J. at 1113-14. The defense counsel argued that the convening authority could not reliably reassess the sentence because prejudicial evidence was admitted on the disobedience charge. Absent that evidence, the defense argued, a different sentence could have resulted. *Id.* at 1114. The defense counsel also contended that once the convening authority reassessed the sentence, he then should determine whether the new sentence was appropriate. *Id.*

[96] *Id.* at 1113.

[97] *Dresen*, 40 M.J. at 463.

[98] *Id.* at 464.

[99] *Dresen*, 36 M.J. at 1113-15.

[100] *Dresen*, 40 M.J. at 464.

[101] *Id.* at 465 (citing United States v. Weatherford, 19 U.S.C.M.A. 424, 42 C.M.R. 26 (1970)). In *Weatherford*, the COMA held that a defense counsel could assist an accused in requesting a punitive discharge from a court-martial. *Id.* at 28. The COMA reasoned that such a request is often one for leniency, where other forms of punishment, such as confinement for an accused with a family to support, might actually be more detrimental. *Id.* However, a defense counsel is not necessarily the "alter ego" of his client, and therefore, he or she should not always comply with the client's wishes. For example, an accused may desire a death sentence over confinement, but the defense counsel should not help the accused attain this goal. *Id.* at 27.

[102] *Dresen*, 40 M.J. at 465 (citing United States v. Robinson, 25 M.J. 43 (C.M.A. 1987); United States v. Webb, 5 M.J. 406 (C.M.A. 1978); United States v. Weatherford, 19 U.S.C.M.A. 424, 42 C.M.R. 26 (1970)). Both *Webb* and *Robinson* involved sentencing arguments by defense counsel for suspended discharges, despite accused's unsworn statements that they desired continued service. In *Webb*, the defense believed that the military judge could suspend a discharge. *Webb*, 5 M.J. at 407. In his dissenting opinion, Judge Cook pointed out that, at the time of trial, the law was uncertain as to the judge's authority to suspend a sentence. *Id.* at 408 (Cook, J., dissenting). Subsequent to *Webb*, in United States v. Occhi, 2 M.J. 60, 63 (C.M.A. 1976), the COMA held that a military judge had no such authority. Because a "fair risk" existed that the judge in *Webb* was influenced by the defense request for a discharge, the COMA overturned the sentence. *Webb*, 5 M.J. at 408. Therefore, by the time *Robinson* was tried, the law was clear that a court-martial could not suspend a sentence. However, the defense counsel was uninformed about this point. *Robinson*, 25 M.J. at 44 (Everett, C.J., concurring). Counsel's argument constituted error, but in light of accused's offenses and prior disciplinary record, no prejudice resulted and the sentence was affirmed. *Id.*

[103] *Dresen*, 40 M.J. at 465.

[104] United States v. Dresen, 36 M.J. 1103, 1113 (A.F.C.M.R. 1993).

[105] *Dresen*, 40 M.J. at 465. The COMA reasoned that these factors could have convinced the convening authority to disapprove the bad-conduct discharge, realizing that accused would soon be separated from the Air Force anyway based on the already-approved administrative discharge. *Id.*

real opportunity at meaningful sentence relief and returned the case for a new action by a different convening authority.[106]

Before arguing against a particular form of punishment—either during or after a court-martial—counsel should secure the client's consent to such a course of action. Ideally, the client's wishes will be put on the record. At trial, this can be done by having the accused make a sworn or unsworn statement. During the posttrial phase, the accused could submit his or her own letter to the convening authority. Alternatively, the defense counsel could ask the accused for preferences in writing or prepare some type of memorandum for record.[107]

The COMA once has again echoed its resounding theme that the convening authority is the "accused's best hope for sentence relief."[108] In the past, the COMA has suggested that defense counsel should bring clemency recommendations by the sentencing authority to the convening authority's attention, even when the accused does not desire the particular form of clemency recommended.[109] The message for defense counsel is clear. Although the accused frequently has an unrealistic and overly optimistic outlook towards the clemency process, in the end, counsel only can give advice. The ultimate decision belongs to the accused. It is, after all, the accused's fate that hangs in the balance. Major Wright.

United States v. Robertson: The Requirement for a Good-Faith Basis to Impeach with Prior Bad Acts

In *United States v. Robertson*,[110] the COMA clarified the requirements for conducting an impeachment using specific instances of conduct, pursuant to MRE 608(b).[111] *Robertson* involved cocaine use. The defense was innocent ingestion, and included testimony from the accused's roommate, Ms. Minter, described by the court as "a recovering drug addict."[112] Ms. Minter testified that she had purchased almost a gram of cocaine but, to avoid what she feared was imminent police detection, she had put almost half of the gram into an open can of beer. The accused subsequently and, according to him, unknowingly drank the beer.[113]

During the defense's presentation, the trial counsel sought to cross-examine Ms. Minter about her prior arrest for conspiracy to commit fraud and attempted burglary. The "good-faith basis" for the trial counsel's inquiry was an arrest report furnished by the Federal Bureau of Investigation (FBI). The trial counsel admitted, however, that he did not know the underlying facts of the arrest.[114] Ms. Minter responded to the cross-examination questions with an attempt to "plead the Fifth," at which point the trial counsel moved to strike her testimony. In a subsequent Article 39(a) session,[115] the defense

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[106] *Id.* The COMA set aside the action of both the AFCMR and the convening authority and returned the record of trial for referral to a new convening authority. The court also directed that a new SJA's recommendation be prepared and that the defense have a new opportunity to submit matters. *Id.*

[107] Counsel need to do this tactfully.

[108] *Dresen*, 40 M.J. at 465 (citing United States v. Stephenson, 33 M.J. 79, 83 (C.M.A. 1991)). In *Stephenson*, however, the COMA noted several factors in emphasizing the importance of the convening authority's action. First, the accused received a lengthy term of confinement (50 years). Additionally, during the presentencing phase the defense declined to present available extenuation and mitigation evidence for fear of damaging rebuttal by the prosecution. Finally, the civilian defense counsel advised the accused that submitting posttrial matters "was useless." *Stephenson*, 33 M.J. at 81-83. *See also* United States v. Bono, 26 M.J. 240, 243 n.3 (C.M.A. 1988) (action by the convening authority in reducing sentence because of defense counsel's error during presentencing phase illustrates that this level of review is "accused's best hope for sentence relief"); United States v. Wilson, 9 U.S.C.M.A. 223, 26 C.M.R. 3, 6 ("It is while the case is at the convening authority level that the accused stands the greatest chance of being relieved from the consequences of a harsh finding or a severe sentence.").

[109] *See* United States v. Clear, 34 M.J. 129 (C.M.A. 1992) (the COMA noted that a convening authority may be so persuaded by the recommendation of an "experienced" military judge for clemency of one type that the convening authority would grant clemency of another type).

[110] 39 M.J. 211 (C.M.A. 1994).

[111] MCM, *supra* note 66, MIL. R. EVID. 608(b) provides:

> Specific instance of conduct. Specific instances of conduct of a witness, for the purpose of attacking or supporting the credibility of the witness, other than conviction of crime as provided in Mil. R. Evid. 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the military judge, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning character of the witness for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified. The giving of testimony, whether by an accused or by another witness, does not operate as a waiver of the privilege against self-incrimination when examined with respect to matters which relate only to credibility.

[112] *Robertson*, 39 M.J. at 213.

[113] *Id.* The government's expert testified that the amount of cocaine metabolite present in the accused's urine was too great to have been caused by the amount allegedly ingested by drinking the beer 66 hours before the urinalysis test on which the prosecution was based. *Id.*

[114] *Id.*

[115] 10 U.S.C. § 839(a) (1988).

counsel objected that an arrest was not a proper basis for impeachment and that the evidence was inadmissible under MRE 404(b). The military judge overruled these objections. Thereafter, the trial counsel asked Ms. Minter whether she thought that her arrest reflected on her honesty and truthfulness, and she responded in the negative.[116]

In a prior written opinion,[117] the AFCMR had concluded that because an arrest is *governmental* conduct, as opposed to the conduct of a witness, it says nothing about the credibility of a witness. The AFCMR observed that while it was possible for the underlying conduct to bear on the witness's credibility, the trial counsel had failed to establish this connection.[118] Accordingly, the AFCMR found that the military judge had abused his discretion in permitting impeachment by evidence of a "mere arrest or, in military parlance, an apprehension."[119] In broad terms, the COMA agreed that error had occurred and, like the AFCMR, concluded that the error was harmless.

The COMA began its analysis by observing that impeachment under MRE 608(b) may not be based on mere misconduct. Rather, the rule requires that the misconduct relate to untruthfulness.[120] The COMA then set forth a test for "proper cross-examinations" concerning misconduct relating to untruthfulness. The test articulated by the COMA has two components: first, the opponent must possess a good-faith belief that the conduct occurred; and second, the conduct must relate to instances of untruthfulness.[121] In *Robertson*, the COMA concluded that the trial counsel's cross-examination did not satisfy either prong of the test.[122]

The trial counsel's reliance on an FBI "rap sheet" (or, presumably, arrest records from any law enforcement activity), was not dispositive. The COMA stated specifically that this document can furnish the required good-faith belief that conduct occurred "*if it details the underlying facts for the arrest.*"[123] The FBI "rap sheet" in this case, however, did not supply this information. Moreover, as previously indicated, the trial counsel admitted that he did not know the facts underlying Ms. Minter's arrest. Without a demonstration of this knowledge, the COMA found it "difficult" to hold that the trial counsel had a good-faith belief that Ms. Minter participated in the alleged crimes.[124]

The COMA observed that an arrest alone, without a showing of the underlying circumstances, is not probative of credibility. The probative character of such an incident requires a showing by the cross-examiner either that the arrest was based on acts affecting credibility, that the arrest record impeaches an assertion that the arrestee enjoys a reputation as a law-abiding person, or that the arrest shows prior untruthful statements by a testifying defendant.[125] The COMA further delineated its observations by discussing what sorts of acts relate to truthfulness or untruthfulness. Relying in part on *United States v. Weaver*,[126] the COMA noted,

> Acts of perjury, subornation of perjury, false statement, or criminal fraud, embezzlement or false pretense, are for example, generally regarded as conduct reflecting adversely on an accused's honesty and integrity. Acts of violence or crimes purely military in nature, on the other hand, generally have little or no direct bearing on honesty and integrity.[127]

In addition to relying on *Weaver*, the COMA cited a number of related decisions[128] which led it to the conclusion that "the key to the impeachment question is not the fact of the arrest

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[116] *Robertson*, 39 M.J. at 214.

[117] United States v. Robertson, 34 M.J. 1206 (A.F.C.M.R. 1992).

[118] *Id.* at 1208 n.5.

[119] *Id.* at 1208. Although the AFCMR found error, the court held that error to be harmless. *Id.* at 1209.

[120] *Robertson*, 39 M.J. at 214.

[121] *Id.*

[122] *Id.* at 215.

[123] *Id.* at 214 (citation omitted) (emphasis added).

[124] *Id.*

[125] *Id.* at 214-15 (citations omitted).

[126] 1 M.J. 111 (C.M.A. 1975).

[127] *Id.* at 118 n.6 (*quoted in Robertson*, 39 M.J. at 215).

[128] *E.g.*, United States v. Leake, 642 F.2d 715 (4th Cir. 1981) (improper to limit cross-examination concerning defrauding an innkeeper and failure to repay loans); United States v. Owens, 21 M.J. 117 (C.M.A. 1985) (cross-examination concerning intentional falsehood on warrant-officer application); United States v. Page, 808 F.2d 723 (10th Cir. 1987) (observing that Federal Rule of Evidence 608(b) includes forgery, uttering forged instruments, bribery, suppression of evidence, false pretenses, cheating, and embezzlement).

itself, but instead, whether the underlying facts of the arrest relate to truthfulness or untruthfulness."[129] In *Robertson*, the COMA could not conclude whether that critical relationship existed because the record of trial did not reveal the facts underlying Ms. Minter's arrest, and the trial counsel could not relate them to Ms. Minter's untruthfulness.[130]

The COMA finally observed that the evidentiary rules *and* the military judge's discretion further limit impeachment by instances of conduct. First, the text of MRE 608(b)[131] prohibits proof by extrinsic evidence if the witness denies the conduct.[132] Second, in his or her discretion, the military judge may exclude the proposed cross-examination altogether.[133] Similarly, pursuant to MRE 403,[134] the military judge may require counsel to avoid use of the term "arrest" and limit examination only to the underlying conduct.[135]

Robertson provides useful and explicit guidance for prosecutors and defense counsel in an important, but sometimes confusing, area of trial practice. As the facts of *Robertson* demonstrate, even an arrest for an offense such as conspiracy to commit fraud will be insufficient, without more, to provide a good faith basis for witness impeachment. At first blush this result appears anomalous. Fraud, after all, is a conscious wrongdoing with an intention to cheat or be dishonest.[136] *Webster's Ninth New College Dictionary* defines fraud as an "intentional perversion of the truth in order to induce another to part with something of value or to surrender legal rights,"[137] and *Black's Law Dictionary* defines fraud as an "intentional perversion of truth" and notes that it is to be distinguished from negligence in that fraud is "always positive, intentional."[138] If an offense comprising such components does not give a cross-examiner per se license to impeach, virtually no arrest will do so.[139]

On the other hand, the COMA's ruling imposes a relatively minimal burden, possibly requiring no more than a phone call by the party seeking to impeach. The decision makes clear, however, that when the arrest record does not describe the alleged crime in sufficient detail, court-martial practitioners must seek additional information, or forego the proposed impeachment. Major O'Hare.

Contract Law Notes

GSBCA Bid Protests: Surviving the First Few Days

Introduction

You are a legal advisor at Fort Snelling, responsible for reviewing procurements originating from your buying command. One afternoon you receive a telephone call from a contracting officer about a contract that she recently awarded. The contracting officer informs you that she has just received a notice of protest and a protest complaint from the General Services Administration Board of Contract Appeals (GSBCA, or board). She states that this is her first GSBCA bid protest and seeks your assistance. In response, you state that you will meet her within the hour to review the protest notice and the complaint. As you hang up the phone, you begin to jot down some notes on the initial steps that you and the contracting officer will take in response to this protest.

[129] *Robertson*, 39 M.J. at 215.

[130] *Id.*

[131] *See supra* note 111.

[132] When the cross-examiner "tests" the witness's reputation or opinion testimony by asking the witness about specific instances of conduct, the questioner is bound by the response, or must "take the answer." If the witness disputes the answer, or denies knowledge of the incident, this ends the inquiry. *See* United States v. Cerniglia, 31 M.J. 804 (A.F.C.M.R. 1991). If the witness "opens the door," however, extrinsic evidence may be admissible. *See* United States v. Trimper, 28 M.J. 460, 467 (C.M.A. 1989) ("Thus if a witness makes a broad collateral assertion on direct examination that he has never engaged in a certain type of misconduct or if he volunteers such broad information in responding to appropriately narrow cross-examination, he may be impeached by extrinsic evidence of misconduct."). In *Trimper*, the witness went beyond what was necessary when answering a question on cross-examination), *cert. denied*, 110 S. Ct. 409 (1989).

[133] The COMA noted that some of the factors a judge might consider include: the importance or lack of importance of the testimony, the age of the conduct, the relationship of the misconduct to truthfulness or untruthfulness, or whether the matter would lead to a time-consuming and distracting explanation on cross-examination. *Robertson*, 39 M.J. at 215 (citation omitted).

[134] MCM, *supra* note 66, MIL. R. EVID. 403.

[135] *Robertson*, 39 M.J. at 215. *But see* United States v. Stavely, 33 M.J. 92 (C.M.A. 1991). The military judge committed prejudicial error in precluding defense cross-examination of the main government witness. She had made admissions in an administrative proceeding that she had lied to her husband about having cashed checks with insufficient funds. *"When such a specific act of misconduct is, in and of itself, directly probative of the witness' truthfulness, a military judge must allow it because, by definition, it is always relevant to the issue of that witness' credibility."* *Id.* at 94 (citation omitted) (emphasis added).

[136] United States v. Wunderlich, 342 U.S. 98, 100 (1951).

[137] WEBSTER'S NEW COLLEGE DICTIONARY 490 (1983).

[138] BLACK'S LAW DICTIONARY 594 (5th ed. 1979).

[139] The COMA observed that various degrees of offenses exist, ranging from an allegation that the witness signed her spouse's income tax form claiming an improper deduction to "something more." *Robertson*, 39 M.J. at 215.

Much has been written about the nature of GSBCA protests and detailing the many nuances of this protest forum or how it differs from other protest fora is outside this note's scope. However, any office that has been involved in a GSBCA protest does not soon forget it. A GSBCA protest places demands on time, personnel, and costs unlike any other judicial undertaking.

This note offers some insight into the first few days of a GSBCA protest and how to respond effectively to a notice of protest.[140] For ease of discussion, this note will highlight the concerns principally associated with postaward protests.[141] Specifically, this note will focus on the coordination required between the buying activity and its trial attorney and how each can work with the other to enhance the likelihood of success.[142] What follows is an overview of a few fundamental steps that the buying activity can take to prepare for what is many times, at best, controlled chaos—the GSBCA Bid Protest.

Jurisdictional Authority of the GSBCA

The Brooks Automatic Data Processing Equipment Act[143] and its implementing regulations restrict the government's ability to procure automatic data processing equipment (ADPE) or FIP resources.[144] The Brooks Act identifies which agencies, contracts, and types of FIP resources fall within its purview. The *FIRMR* provides additional guidance regarding the scope of the Brooks Act.[145] Significantly, the Brooks Act vests in the GSBCA the authority to hear protests involving the procurement and acquisition of FIP resources.[146]

The GSBCA is often the forum of choice for vendors involved in a government procurement for FIP resources who "want their day in court."[147] Unlike the deferential treatment generally accorded the government by the GAO,[148] the board's de novo standard of review[149] usually requires a more comprehensive response from the government. This de novo standard is a principle reason underlying the board's preference for conducting hearings which usually require the live presentation of witnesses and admission of large volumes of documentary evidence.

The preference for hearings means that the government must be prepared to engage in and respond to the full range of discovery, to include written interrogatories and the taking of depositions. As if the specter of engaging in full-blown discovery prior to trial were not enough, the board rules further require the GSBCA to begin the hearing on the merits *no later than 35 calendar days* after the filing of a protest and to issue a decision *within 65 calendar days*.[150] In light of these stringent time requirements, once a protest is filed, the government must be prepared to respond quickly, efficiently, and forcefully. The result is a litigative process that is demanding, expensive, and one that all too frequently tries the patience of those involved.

Pay Me Now or Pay Me Later: Prepare Early for Litigation

Although true for all procurements, the early involvement by legal counsel in a FIP procurement is especially important and often will result in dramatically positive results for the

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[140] To the extent practicable, this article incorporates the changes to the GSBCA protest process mandated by the Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3243, 3291-95 (amending 40 U.S.C. § 759) [hereinafter FASA].

[141] Although many of the tips or "lessons learned" discussed in this note apply to preaward protest scenarios, these protests carry with them their own unique set of rules. For example, the time frames associated with the filing of a preaward protest often are different from the time frames for postaward protests. *See* GSBCA RULE 5(b)(3).

[142] The Army has two offices that are primarily responsible for defending against bid protests. The Protest Litigation Group at the United States Army Material Command (AMC) Command Counsel's office processes General Accounting Office (GAO) and GSBCA bid protests involving AMC buying activities. The Contract Appeals Division at the United States Army Litigation Center represents those commands outside of AMC.

[143] Pub. L. No. 89-306, 79 Stat. 1127 (1965), 40 U.S.C. § 759 [hereinafter Brooks Act]. The Brooks Act assigns responsibility for acquisition of all federal information processing (FIP) resources to the General Services Administration.

[144] The *Federal Information Resource Management Regulation* (*FIRMR*) defines FIP resources expansively, to include ADPE as that term is used in the Brooks Act. C.F.R. § 201-4.001 (1994). The *FIRMR* also is published at appendix A of the *Federal Acquisition Regulation* (*FAR*). *See* GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. (Apr. 1, 1984) [hereinafter FAR]. Note that *Defense Federal Acquisition Regulation Supplement* (*DFARS*) part 239 supplements the *FIRMR*. *See* DEP'T OF DEFENSE, DEFENSE FEDERAL ACQUISITION REG. SUPP. (Apr. 1, 1984) [hereinafter DFARS].

[145] *FIRMR Bulletin A-1* provides guidance for determining whether a particular contract falls within the Brooks Act. The United States Court of Appeals for the Federal Circuit and the GSBCA recognize *FIRMR Bulletin A-1* as the definitive statement on the scope of the Brooks Act. Best Power Technology Sales Corp. v. Austin, 984 F.2d 1172 (Fed. Cir. 1993); Pindar Donnelly Partnership v. Department of Commerce, GSBCA No. 12667-P, 94-2 BCA ¶ 26,673.

[146] 40 U.S.C. § 759(f).

[147] *See Winning Bid Protests In Three Forums*, Fed. Cont. Rep. (BNA) No. 4, special supp. (Jan. 31, 1994).

[148] The GAO's standard of review is similar to that applied by federal courts under the Administrative Procedures Act, 5 U.S.C. § 706. The GAO does not conduct a de novo review. Instead, it reviews the agency's actions for violations of procurement statutes or regulations, arbitrary or capricious actions, or for abuse of discretion. Hattal & Assocs., B-243357, July 25, 1991, 70 Comp. 632, 91-2 CPD ¶ 90.

[149] 40 U.S.C. § 759(f)(1); *see also* B3H Corp. v. Department of the Air Force, GSBCA No. 12813-P, 94-3 BCA ¶ 27,068.

[150] *See* FASA, *supra* note 140, § 1433; 59 Fed. Reg. 61862-64 (amending GSBCA RULES 19(a)(3), 29(b)(2)).

buying activity. To the maximum extent practicable, a government legal advisor must be involved at the earliest stages of the procurement. He or she should work hand-in-glove with the contracting officer and source selection officials to assist in drafting the solicitation, processing and evaluating proposals, and reviewing the award determination. This early involvement not only will reduce the potential for protest but having a "legal point of contact" involved in the preaward stages of a procurement will facilitate the flow of information between the buying activity and the trial attorney should a protest be filed.

Assess the Potential for Protest

Early in the procurement process, the procuring activity often can identify those procurements that have a heightened probability of protest. In this day of downsizing and budget cuts, the procurement dollar is rapidly becoming something of an endangered species. Not surprisingly, this smaller procurement pie means disappointed offerors may be more likely to challenge an adverse contract award decision.[151] Moreover, the potential for protest certainly increases as the dollar value of the procurement increases.

Additionally, the identity of the offerors may provide some insight as to the likelihood of protest. One need only scan the *Bid Protest Digests* to learn a rather unpleasant fact of life—some firms seem more interested in filing a protest with the board than first seeking redress with the agency.[152] Fortunately, most firms act responsibly, carefully investigating the award decision and assessing the likelihood of success, prior to acting on any decision to file a protest.

Last, but certainly not least, vendor communications generally will provide the buying activity a fairly accurate "barometer" of the potential for protest. The tone and language of these communications frequently demonstrate the extent of vendors' displeasure, the bases for their displeasure, and the action they may take to seek redress of their concerns.

Assess the Impact of the Warner Amendment and the GSBCA Suspension on Your Procurement

In assessing the likelihood of a GSBCA protest, the buying activity also must consider whether the Brooks Act even applies to its procurement and the impact of a Brooks Act suspension on contract performance. The board typically schedules a prehearing conference with the litigants within a few days of the protest. Because of the impact that these two concerns have on the future of the protest, if not the overall procurement, the board generally will dispose of any issues regarding the government's position as quickly as possible. Hence, if challenged by the protester, the government should be prepared to defend its position regarding any assertion of the Warner Amendment or a challenge to suspension in a hearing before the board within the first few days of the protest.

The Warner Amendment

The Warner Amendment specifically excludes certain categories of procurements from GSBCA bid protest jurisdiction.[153] Agencies generally make Warner Amendment determinations before issuing the solicitation. No matter when this determination is made,[154] however, the buying activity should be prepared to defend any assertion of the Warner Amendment exemption. Given the board's predilection for hearings, the agency should anticipate, if not affirmatively request, a hearing on the issue as quickly as possible. The quick resolution of an assertion of the Warner Amendment exception in favor of the government will save all parties considerable time, effort, and expense.

Brooks Act Suspension

Another important issue that the buying activity must address early in the procurement process is whether to challenge the protester's request for a suspension. If timely filed, the protester is entitled to the suspension unless the agency

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[151] *See, e.g.*, Saundra Torry, *Forecasting the Golden Specialties of 1994*, WASH. POST, Jan. 3, 1994, at F7 (quoting an attorney with a major law firm as asserting, "When the defense budget is flush, nobody fights . . . [w]hen the budget is tight everybody fights for everything.").

[152] In the author's experience, some firms appear to incorporate the protest system as part of their marketing strategy. In part, in an effort to eliminate this abuse of the system, Congress provided the board affirmative authority to sanction parties that file protests in bad faith or frivolously. *See* FASA, *supra* note 140, § 1434. *But see* Integrated Sys. Group, Inc., GSBCA No. 11336-C(11214-P), 1994 WL 642438 (Nov. 4, 1994) (board analyzes authority under the FASA and determines that it "clearly" does not have authority to impose monetary sanction).

[153] *See* 10 U.S.C. § 2315; 40 U.S.C. § 745(a)(3); DFARS, *supra* note 144, 239.001-70. Of significance to the Army, the Warner Amendment excludes procurements that are used for intelligence purposes, for the command and control of military forces, and any procurement that is critical to the direct fulfillment of a military mission from GSBCA protest jurisdiction. Contracting activities must obtain approval for use of the Warner Amendment. *Id.* 239.001(c). *Army Federal Acquisition Regulation Supplement* 39.001-70 sets forth the Army approval procedures. *See* DEP'T OF ARMY, ARMY FEDERAL ACQUISITION REG. SUPP. (1 Dec. 1984).

[154] Failure to obtain prior determination does not prevent assertion of the exclusion. Cyberchron Corp., 867 F.2d 1407 (Fed. Cir. 1989).

can demonstrate to the board that this action is not appropriate.[155] Under pre-FASA rules, a hearing on the issue of suspension usually occurred within seven to ten days of the filing of protest. Now, the FASA requires the board to conduct this hearing within five days.[156] The quick timing of the suspension hearing further underscores the importance of prior planning and preparation.

To prevail, the government must demonstrate that urgent and compelling circumstances that significantly affect the interests of the United States will not permit waiting the sixty-five days that it takes for the board to render a decision.[157] This "urgent and compelling" threshold requires the government to meet a high burden of proof before the board will deny a protester's request for suspension.[158] Accordingly, to have a fair shot at prevailing in its challenge to a protester's request for suspension, the agency should ensure that its witnesses, their testimony, and any relevant documentary evidence reflect the urgent and compelling nature of the protested procurement.[159]

"Educate" the Trial Attorney

Teamwork and effective communication between the buying activity and the trial attorney's office are essential to successfully preparing for and defending against a protest. The hallmark of many FIP resource procurements is that they generally involve complex issues, voluminous documentation, and a large number of witnesses. Given the incredibly compressed litigation timetable, it behooves the buying agency to, at the very least, offer its supporting litigation office an opportunity to learn something about the acquisition before the protest window fully opens. Generally, the buying activity can most effectively accomplish this task by simply providing a focused briefing on the acquisition to its trial attorney.

In addition to educating the trial attorney, this briefing serves several useful purposes. First, it forces the buying activity to identify key personnel and documents and organize this information with an eye toward having it reviewed by someone outside of the procurement process, such as the board judge. At a minimum, the buying activity should be prepared to brief the background facts of the procurement, the statement of work, the evaluation methodology, the proposals submitted, and the evaluation process.

The buying activity also should afford its trial attorney the opportunity to examine important documents such as evaluation reports or other communications provided to source selection officials for their review in making an award decision. This allows the trial attorney the opportunity not only to learn about the strengths and possible weaknesses of the case but to begin building the case around those strengths and weaknesses.

Additionally, the briefing provides an opportunity for the trial attorney to meet, discuss, and question key players in the procurement process. This allows the trial attorney to better understand the voluminous documentation and perhaps glean information not otherwise set forth in writing. Just as importantly, this interview process provides the trial attorney one of the first opportunities to evaluate procurement officials as potential witnesses.

Last, this briefing represents the first major step towards establishing a cohesive teaming arrangement between the litigation office and the buying activity. Both the trial attorney and the buying activity should use the briefing conference to identify and assign responsibilities for defending against the protest. In addition to discussing the substantive legal issues, the trial attorney also can educate the buying activity on the administrative and logistical requirements peculiar to litigating a GSBCA bid protest.

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[155] For postaward protests, if a protest is filed within ten days after award, or the fifth day after the debriefing date, whichever is later, an interested party may request suspension of the agency's Delegation of Procurement Authority (DPA) and, thus, the acquisition. *See* FASA, *supra* note 140, § 1433; GSBCA RULE 19(d).

[156] The GSBCA recently published its proposed change to Rule 19 which states as follows:

> (2) *Protest suspension hearing.* The Board will, upon timely request by an interested party, hold a hearing to determine whether the Board should suspend the . . . procurement authority on an interim basis until the Board can decide the protest. Such a request is timely if the underlying protest is filed on the later of (i) the tenth day after the date of contract award; or (ii) the fifth day after the debriefing date offered to an unsuccessful offeror for any debriefing that is requested and, when requested, is required. The Board will hold the requested hearing within 5 days after the date of the filing of the protest or, in the case of a request for debriefing, . . . within 5 days after the later of the date of the filing of the protest or the date of the debriefing.

59 Fed. Reg. 61861, 61863 (1994).

[157] ViON Corp., GSBCA No. 11002-P, 91-1 BCA ¶ 23,615 (Board states that government must "show that the circumstances are such as to 'allow no alternative except by proceeding within the statutory period allowed for resolution of the protest.'").

[158] GSBCA RULE 19(d); *see also* Irvin Techs., Inc., GSBCA No. 11581-P, 92-1 BCA ¶ 24,674.

[159] Among the reasons the board has found to be persuasive include procurements that: support war efforts or ongoing hostilities; involve public health activities; or will lead to agency shutdown. *See* ViON Corp., GSBCA No. 11002-P, 91-1 BCA ¶ 23,615 (Gulf War sufficient reason to not suspend computer contract for Strategic Petroleum Reserve); Berkshire Computer Prods. v. Department of the Army, GSBCA No. 12228-P, 93-1 BCA ¶ 25,538 (critical hospital computer system which ran out of disk space); Spectrum Leasing Corp., GSBCA No. 9881-P, 89-1 BCA ¶ 21,530 (systems maintenance to support vital function).

Review the Notice of Protest

When a contracting officer receives a notice of protest, the contracting officer immediately should take a number of steps aimed towards enhancing the effectiveness of the government's response. First, examine the notice of protest. The notice of protest will disclose a number of things. It will set out the protest number of the case, which will be used to identify the protest in all future communications with the board and among the parties. More importantly, it will indicate when the board received the protester's complaint.[160] The notice also will identify the judge assigned to the protest.[161] Finally, the notice will schedule a prehearing conference with the board at which the parties will address the protest timetable.

Read the Protest Complaint

Accompanying the notice of protest will be the protester's complaint. Although the following advice seems obvious, it bears repeating: study this document carefully. Depending on the allegations set out by the protester, you may not only gain insight into the strength of the protester's case, but you may uncover information that will lead to a speedy disposition of the protest. Additionally, information that the protester reveals in its allegations will provide the government with its first leads regarding the type and scope of discovery necessary to successfully defend the award decision.

Establish a "Chron File"

On receiving the notice of protest, establish a "chron file." Although this simple tool consists of little more than a set of three-ring binders (chron notebooks) with numbered tabs, do not understate its value. Given the frenetic nature of a GSBCA bid protest, documents will literally seem to be flying throughout the office. These documents range from solicitation extracts, to contracting officer statements, to witness declarations, to draft answers responding to the protester's complaint, to purchase orders for courier and copying services, as well as the documents transmitted by the protester to the government. Failure to establish a system for controlling and cataloging protest communications quickly leads to confusion and, more importantly, will cripple the government's ability to litigate its case.

The advantage of the chron file is that it establishes a readily accessible file of all documents and communications generated during the course of the protest. The beginning of each chron notebook should have a simple table of contents. As documents are received, a clerk or the person receiving the document makes copies for interested individuals, "files" the original in the chron notebook, and then annotates this entry in the table of contents. By so doing, all documents are kept in one central location and made available for examination by everyone working on the case throughout the duration of the protest.

Develop Your Plan of Attack

Finally, once everyone in the government has a copy of the protest complaint, the field attorney, the contracting office, the buying activity, and the trial attorney should meet and begin developing their protest game plan. Ideally, this conference should occur within twenty-four hours after receiving the protest. Working as a team, the government can quickly and efficiently determine its response to the protest. Occasionally, the protester's allegations have merit and rethinking the award decision is in the best interest to all concerned.[162] Other times, you may find that the protest is ripe for a "quick kill," via either the formal submission of some jurisdictional motion or a motion for summary relief. Frequently, however, the facts surrounding the protest must be developed before deciding the government's course of action.

The importance of this initial conference cannot be overemphasized. During this session, the government can, for perhaps the first time, gauge the strength of its case in relation to the protest counts as alleged. Furthermore, the conference affords an opportunity for the field office and the trial attorney to focus their game plan and strategy in defending against the protest. If necessary, the trial attorney can educate the contracting office and field attorney, to the extent necessary, on the peculiarities associated with a GSBCA protest, as opposed to the more familiar GAO protest. Additionally, the trial attorney can provide insight on the peculiarities of the board given the factual circumstances of the protest. Conversely, the field office can provide the trial attorney with its insight on the protest, to include potential strengths and weaknesses.

Notify All Interested Parties

During this initial conference, the contracting office should ensure that a number of administrative, yet important, tasks

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[160] The GSBCA Rules of Procedure establish jurisdictional time restrictions on protest litigants. Generally, the GSBCA strictly enforces protest time limits. Computer Dynamics, Inc., GSBCA No. 10288-P (10209-P), 90-1 BCA ¶ 22,328 (protest untimely because it was filed after hours on the last day by facsimile machine; fact that it was logged in on the last day by a GSBCA clerk working late was immaterial); Integrated Sys. Group, Inc., GSBCA No. 11075-P, 91-2 BCA ¶ 23,790 (facsimile transmission not complete until after closing and protest, therefore, was late).

[161] To gain some insight into the hearing judge assigned to your case, review the brief biographies of all board judges in Commerce Clearing House's (CCH's) *Contract Appeals Decisions* volume.

[162] This note does not discuss the possibility of resolving the protest through alternative dispute resolution. However, the agency always should consider this option as an effective method of addressing the protester's allegations while minimizing the costs of resolving the dispute for all parties. *See* FAR 33.102(c).

are accomplished. First, the contracting office must notify all interested parties within one day of receiving a copy of the protest.[163] Notification can be made orally or in writing. Although a relatively straightforward requirement, the contracting office should take a few simple steps to ensure that this notification is made properly. For example, if notification is made orally, the contracting office should make a memorandum indicating the place, time, and identify of the person called. If the agency elects to notify pertinent parties by facsimile, the office must ensure proper receipt by the addressee with a follow-up telephone call, noting in a memorandum for record, the time, place, and identity of the person with whom confirmation was made.[164] After making this notification, the agency then must notify the Director, Authorizations and Management Reviews Division (KMA) at the General Services Administration.[165] At the prehearing conference, one of the first questions that the judge will pose to government counsel is whether this notification process was accomplished, and if not, why not.

This notification process also is important in that it triggers the "protest clock" for timely intervention by an interested party. A party has four working days to file its notice of intervention.[166] Failure to intervene timely may well foreclose any opportunity for a party to participate in the protest. Once the potential intervenor's protest clock has run, parties to the protest will then know their opponents and their allies.

Assemble the Rule 4 File

Another administrative, yet important, task is preparing the "Rule 4 file," or protest file.[167] Board rules require the government to publish the Rule 4 file for all protest parties and the GSBCA within ten working days of the filing of protest.[168] The Rule 4 File is the "litigation bible" that all parties will use throughout the life of the protest, to include the three board judges deciding the protest.

Moreover, the Rule 4 file is the first significant collection of documents that the board will review as it attempts to understand the case before it. As the old saying goes, "You only make a first impression once"; hence, do not take quality reproduction of the Rule 4 file lightly. Providing the board and protester with a Rule 4 file which contains documents that are incomplete, difficult to read, or out of order not only makes it difficult for all parties to refer to the file during the protest, but may be viewed as representative of the quality of work produced by the contracting activity—an impression that may influence the board's impression of the overall quality of the procurement process.

The Rule 4 file should contain all documents that are relevant to protest issues as alleged. The Rule 4 file lays out, generally in chronological sequence, the story behind the procurement as it relates to the issues raised in the protest. The amount of work and costs involved in preparing and copying the file obviously depends on the size and complexity of the acquisition. The Rule 4 File plays a crucial role in portraying not only the state of the case but, often, the strength of the government's case.

Identify Administrative and Logistical Support Requirements

It is not unusual for FIP procurements, particularly complex and high dollar value acquisitions, to involve a tremendous volume of documents. Moreover, given the importance of the Rule 4 file, assuring quality and expedient copying of protest documents may overload the reproduction assets available at the contracting office. Therefore, contracting offices often contract out copying requirements associated with a protest.

Additionally, the trial attorney's office will require the buying activity to execute purchase orders for courier services. Because of the tight time constraints, processing and conveying protest documents—such as, the Rule 4 file, briefs, and other litigation documents—to opposing counsel and the board frequently requires the use of a courier. The bid protest team at the Contract Appeals Division generally requests that the buying activity set aside an initial amount of no less than $2500, and often requests the amount authorized be increased as the protest progresses.

The Prehearing Conference

The board will hold a prehearing conference within six working days of the filing of a protest.[169] All parties to the protest, including intervenors, will participate. During the prehearing conference, the board will establish a timetable for the expeditious disposition of the protest. To this end, the judge will want to accomplish the following. First, as previously noted, the judge will want to know whether the govern-

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[163] GSBCA RULE 5(d).

[164] *See* Laptops Falls Church, Inc., GSBCA No. 11322-P, 91-3 BCA ¶ 24,252 (government reliance on facsimile receipt alone insufficient to show that protester received notice of protest).

[165] GSBCA RULE 5(d).

[166] *Id.* 5(b)(4).

[167] *Id.* 4. This file is similar to the Rule 4 file required by the Armed Services Board of Contract Appeals (ASBCA) in Contract Disputes Act appeals.

[168] *Id.*

[169] *Id.* 10(a). Depending on the location of counsel, the board may convene this conference at its offices in Washington, D.C., or by telephone conference call.

ment has notified all interested parties (because the judge also wants to know who the potential players in this litigation game will be). The judge may then address the issues involved in the protest as alleged in the protest complaint, frequently attempting not only to obtain some insight on the scope of the case but to better focus the key issues in the protest.

As noted above, the judge also will want to know the government's position regarding suspension of contract performance.[170] This is when your prior planning and meetings pay big dividends. Again, the FASA now mandates that the board hold a suspension hearing within five days of the protest or required debriefing.[171]

Additionally, during this prehearing conference, the parties will work with the judge on the extent and scope of discovery. In addressing this issue, the board frequently asks about the necessity for a protective order.[172] Whether a protective order is required will depend on the complexity and type of procurement before the board. Exactly how much discovery the board will permit generally depends on the judge. Experience shows that some judges strictly control the amount and scope of discovery, particularly the taking of depositions—a time-consuming and expensive litigative exercise. Other board judges allow the parties greater flexibility and latitude in conducting discovery.

Once the parties have met, the board will then publish a memorandum memorializing the protest timetable discussed during the prehearing conference as well as other significant issues raised by the parties during this meeting. This prehearing conference represents the first real opportunity for trial attorneys on both sides to begin educating the board as to the merits of their respective positions. Therefore, advance preparation is crucial to responding intelligently to questions posed by both the protester and the board and is a key first step towards seizing the initiative in successfully defending against the protest.

Conclusion

By taking the time to prepare its litigation strategy before the "protest window" opens, the government can minimize the impact caused by the confusion that inevitably results from the fast-paced time requirements imposed on GSBCA litigants. Early development of an initial game plan focuses the responsibilities of the many players working on the government team and greatly enhances the potential for success in defending against a protest. Central to success in the GSBCA courtroom, however, is the ability of the buying activity and the trial attorney to work together as a team. By careful planning and early coordination, the buying activity can well be on its way to successfully defending against a GSBCA bid protest. Major Ellcessor.

[170] Additionally, the government will want to bring any known jurisdictional issues to the board's attention.

[171] *See supra* note 156.

[172] GSBCA RULE 12(h).

Claims Report

United States Army Claims Service

Personnel Claims Notes

Claims Information and the Installation Transportation Office Outbound Shipping Counselor

The installation transportation office (ITO) outbound shipping counselor plays an important role in the claims process. This counselor usually is the first person that a shipper (and a possible future claimant) visits in preparation for shipping his or her personal property. Field claims offices recognize the importance of this role and the information regarding claims procedures given by the counselor to the shipper.

Unfortunately, sometimes the claims information that the counselor provides to the shipper is insufficient or the shipper fails to realize its importance.

Accordingly, to assist field claims offices in working in close coordination with their respective ITO outbound shipping counselors, the following checklist is provided. Reproduce this checklist and give it to the ITO outbound shipping counselors to use each time they counsel an outbound shipper. The checklist should be attached to the shipper's copy of *DD Form 1797*. Lieutenant Colonel Kennerly.

Personal Property Counseling Checklist
Addendum to Part VII (Liability, Claims, Protection)

The following additional guidance is provided to you to help you better understand the claims process if you find it necessary to file a claim for your personal property lost or damaged in shipment.

a. The maximum amount that can be paid for any loss or damage to personal property arising from a single incident is $40,000.

b. Within this $40,000 limitation, there are maximum amounts allowable for certain items. For example, if you own a stereo system worth $5000 and it is lost in shipment, the maximum amount that can be paid is $3500. Please consider such limitations in deciding if you need to purchase extra coverage for your personal property. The ITO outbound shipping counselor can advise you on Option 1 and Option 2 coverage (counselor should have separate worksheet for these coverages), or you can decide to purchase private insurance. If the *It's Your Move* pamphlet is available, read it. It contains a table listing the maximum amounts allowable for certain items. If the pamphlet is unavailable, or if you have additional questions, consult your ITO outbound shipping counselor or local military claims office.

c. Please pay attention to the inventory that the carrier prepares. It will be completed prior to departure from your quarters by the carrier's representative, usually the carrier's driver. It will contain a listing of your personal property and you will be required to sign it before the driver leaves. The inventory should be an accurate, legible, descriptive list of your household goods. Items not packed in cartons usually will reflect the condition of the property by use of exception and location symbols. These symbols are found at the top of each inventory page. Read the inventory carefully to make sure that your property is accurately described. If you have a disagreement with a particular item, note your disagreement on the exception part of the inventory next to the item in question or in the "Remarks/Exceptions" section usually found at the bottom of the inventory page (be sure to identify the inventory line number and item that you are commenting on) before the driver leaves your quarters. Be specific as to why you disagree. If the carrier's representative fails to list a general description of the contents of a carton listed on your inventory, request that it be done.

d. Ensure that your high value items (*e.g.*, stereo components, televisions, cameras, video recorders, jewelry, comic books, baseball cards) are listed on the inventory. Failure to do so makes it difficult to prove that you actually gave the item to the carrier to be shipped. Hand-carry your jewelry and other small expensive items with you.

e. *Do not ship your proof of ownership documents (e.g., purchase receipts, prior appraisals, pictures, etc.) of your personal property with your household goods. Hand-carry these important documents.*

f. Some carriers will, in addition to the normal inventory, prepare a "Hi-Val" inventory to reflect your expensive items. This is permissible. Make sure it adequately identifies your expensive items. At delivery, you may be requested to verify delivery of these items by signing this separate inventory. Before you sign this inventory, open every carton to visually verify receipt of the items. Failure to verify receipt at delivery could preclude a later claim for such an item if it is missing. Some carriers may request that you open these cartons even if you waive unpacking by the carrier. Please cooperate with this request. It is in your best interest.

g. If you own a large number of items such as expensive comic books, baseball cards, compact discs (CDs), make sure you conduct a separate inventory of each item prior to shipment. This inventory will help you account for these items if some or all of them are lost in shipment. If these items are extremely valuable, you should consider purchasing private insurance to protect them against loss or damage. You will have the burden of proving ownership and value. For example, if prior to shipment, you cannot prove that you own a particular comic or baseball card and that it is mint condition, you should consider some type of professional appraisal to substantiate ownership and value. It will be extremely difficult to prove ownership and value for an item after it is lost if you do not have such proof. An appraisal made after the item is missing, based on your verbal description, will have very little value. It is a good idea to review all of your personal property, especially your expensive property, to see if you have some form of proof of ownership and/or value. If you do not, an appraisal is one method to determine value. Another way to substantiate ownership and proof of the purchase price—if not too much time has passed—is to contact the store where you made the purchase to see if it still has a copy of your purchase receipt. Any additional steps that you can take prior to the shipment of your personal property, to substantiate ownership and value of your property, is in your best interest.

h. If you ship CDs, video tapes, baseball cards, comics, cassette tapes, records, be sure that the number of the items as well as a description appears on your inventory prepared by the carrier (*e.g.*, 220 compact discs in a 1.5 carton).

i. When the carrier's driver arrives at your new quarters, the driver will offload and place your property in your new quarters. Take care to accurately check off each item on your inventory as it is offloaded. When the off-loading is completed, the driver will give you five copies of *DD Form 1840/1840R* (*DD Form 1840R* is the reverse of *DD Form 1840*). *If you discover damage or loss to your property at time of delivery, list those damaged or missing items on DD Form 1840 before the driver leaves your quarters. If you need extra space, use a separate piece of paper and continue listing the damaged or missing items. Be sure to write on the bottom of the DD Form 1840 that there is a continuation sheet. DO NOT USE THE DD FORM 1840R (reverse side of DD Form 1840) TO CONTINUE LISTING ITEMS. The DD Form 1840 is used to grade the carrier's performance on how well the carrier moved your personal property. It is important to fill out the DD Form 1840 to ensure that the carrier is properly graded. If you find no damage at delivery, you should write the word "NONE" on the DD Form 1840.* The driver should leave you with three of the five copies of the *DD Form 1840/1840R*.

j. You will use the *DD Form 1840R* to list later discovered damaged or missing items. Remember that you have seventy days to list such missing or damaged items and turn the *DD Form 1840R* in to the nearest military claims office. READ THE DIRECTIONS ON THE DD FORM 1840/1840R CAREFULLY. Failure to list all lost and/or damaged items not listed on the *DD Form 1840* or failure to turn the *DD Form 1840R* into a military claims office within the seventy-day period could result in no payment or a reduced payment made to you for the items not timely filed.

If you have additional questions after reading this information, do not hesitate to ask your ITO outbound shipping counselor or your nearest military claims representative for clarification.

Recovery of Funds by the Atlanta RSMO

Effective January 1, 1995, recovery of funds against a non-temporary storage (NTS) contractor located in the Atlanta Regional Storage Management Office (RSMO) area will be accomplished directly by the Atlanta RSMO. This program is an eighteen-month test program and only applies to the Atlanta RSMO during the test period. The Military Traffic Management Command (MTMC), Atlanta RSMO, and the USARCS entered into a Memorandum of Agreement to set forth the parameters of this program.

Regional Storage Management Offices are the contracting offices that administer the basic ordering agreements entered into between the NTS contractors and the Army. Allowing the RSMOs to conduct complete recovery actions, from initial demand through settlement or offset, on claims involving NTS contractors, will offer several advantages for contract administration. Some of the advantages to contract administration include: (1) providing the RSMOs with accurate and timely claims data that can be used for quality control in the administration of NTS contracts; (2) decreasing recovery processing time by eliminating the field claims offices, command claims services, and the USARCS from the recovery process; and (3) providing a more complete picture of NTS contractor performance.

All files requiring recovery action against an NTS contractor in the Atlanta RSMO[1] area will be sent directly to the Atlanta RSMO when the recovery action falls into one of the following categories, regardless of the date of the incident:

a. All direct deliveries out of NTS when no other third party is involved—such as a GBL carrier;

b. Other deliveries out of NTS when another third party is involved—such as a GBL carrier—but only after the SARCS settles the carrier's liability claim;

c. Incidents of unusual occurrences, *e.g.*, fire or flood in NTS warehouse, when no other third party is involved—such as a GBL carrier or an insurer; or

d. Liability owed by a bankrupt warehouse or one that no longer does business with the government.

If you have a recovery action that falls into one of these categories and the contractor is in the Atlanta RSMO region, forward the file directly to the Atlanta RSMO. Field claims offices should enter the office code "FA" into the claims data base to transfer a file to the Atlanta RSMO. The RSMO will use the code *"AA"* to accept the file. The RSMO office code will be "C30." Include a transfer diskette with the file.

The Atlanta RSMO has been informed that the field claims offices will complete recovery determinations on the *DD Forms 1844* prior to mailing the files, and that the Atlanta RSMO should call the responsible field claims office if questions arise about a certain file. Please provide the RSMO personnel with the same fine cooperation that you provide to the USARCS. Major Polk.

Processing Affirmative Claims for Asbestos-Related Diseases

A number of people have contracted various diseases after being exposed to products containing asbestos. Some have brought suits against the manufacturers of these products and at least one class action suit has been filed against a manufacturer of these products.

The United States District Court for the Eastern District of Texas has before it a class action suit involving individuals who have contracted asbestos-related diseases.[2] This suit only involves individuals exposed to products manufactured by the Fibreboard Corporation.

Many individuals have received treatment at government expense for the diseases that they contracted after being exposed to products containing asbestos. Consequently, some field claims offices may be pursuing affirmative claims to recover the costs of medical care provided to these individuals.

The Department of Justice (DOJ) generally will *not* pursue recovery of these asbestos-related medical costs. The reasons are two-fold: First, there is a limited amount of money available to pay the tens of thousands of still-extant claims; indeed, the settlements emerging (including those involving a number

[1] *See* DEP'T OF ARMY, PAMPHLET 27-162, LEGAL SERVICES: CLAIMS 71, fig. 3-10 (15 Dec. 1989) [hereinafter DA PAM. 27-162].

[2] Ahearn v. Fibreboard Corp., No. 6:93 Civ. 526 (E.D. Tex.)

of large companies in Chapter 11 bankruptcy) are paying far less than the awards typically granted after trials. The government does not wish to further reduce victims' recoveries by asserting medical cost recovery claims. Second, in cases where the government brings suit against a private party, that party may counterclaim against the government; in these cases, some of the defenses that the government normally would have to such suits, if brought independently, may not apply. Consequently, in these cases, a suit brought by the government could increase the cost of litigation without resulting in a substantial net recovery for the Treasury.

The only asbestos-related claims the government should pursue are those that are included in injured parties' suits by operation of law (as in Wisconsin, for example). This will be determined on a case-by-case basis. This policy does not apply, however, to subrogation claims under the Federal Employees Compensation Act, where the position of the Department of Labor is that the government *must* assert its subrogation rights.

If your office has any open claims involving members of the Ahearn class action suit or similar claims that do not involve the Fibreboard Corporation, you should send a copy of each file to the Affirmative Claims Branch, USARCS. The Affirmative Claims Branch will review the file and forward it to the DOJ. You should concurrently notify all interested parties that you have transferred the file. The DOJ will then determine whether to withdraw or continue to pursue the government's claim.

In the future, field claims offices will not assert affirmative claims in these cases. This is true even if the injured party is pursuing an action on his or her own behalf and offers to include the government's claim in the suit. Field claims offices should forward these potential claims to the Affirmative Claims Branch, USARCS, for further action. Captain Park.

Torts Claims Note

Erroneous Supplemental Payments of Tort Claims

Army regulations currently state that the settlement of a property damage (PD) claim will preclude the settlement of a subsequently filed personal injury (PI) claim.[3]

However, based on recent discussions with representatives of the DOJ and the General Accounting Office (GAO), a PD claim may be paid to an injured claimant or to the insurer and then a subsequent PI claim may be paid to the same claimant for personal injuries and also to the insurer for the subrogated medical bills and lost earnings. The documents in the PD file should be marked as "Property Damage Only." The last two sentences in paragraph 2-20c(2), *Army Regulation (AR) 27-20*, have been deleted from the soon-to-be-published new *AR 27-20*. Under the authority of the Commander, United States Army Claims Service (USARCS),[4] however, this change in policy is effective immediately. This change does not affect the prohibition discussed in the May 1994 Claims note against paying an additional amount for property damage once payment has been made (*e.g.*, for additional cost, or hidden damage).

Use the following criteria in implementing the policy change:

1. Use a settlement agreement for the payment of all property damage claims and marked "For Property Damage Only." For Federal Tort Claims Act (FTCA) claims,[5] a *Standard Form 1145* normally will be used. For Military Claims Act (MCA) claims,[6] *DA Form 1666* normally will be used.

2. In a clear liability claim, the appropriate amount stated on the low estimate may be paid if the estimate is correct. Where liability is in doubt, a reduced amount reflecting the degree of comparative negligence will be paid.

3. Where the predicted value based on the claims judge advocate's (CJA) or claims attorney's estimate of all claims, actual and potential, arising from an incident exceeds $25,000, no claims may be paid without discussion and agreement by the USARCS Area Action Officer (AAO).[7] If the total value in a FTCA claim exceeds $200,000, the USARCS must obtain written approval from the DOJ.

4. Where the claimant is an active duty service member and the PI claim is excluded by the incident to service doctrine, the claimant must agree the settlement is final and conclusive for both PD and PI. No marking for PD only will be made in the file.

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[3] DEP'T OF ARMY, REG. 27-20, LEGAL SERVICES: CLAIMS, para. 2-20c (2) (28 Feb. 1990) [hereinafter AR 27-20]. *See also* Tort Claims Note, *Erroneous Supplemental Payments of Tort Claims*, ARMY LAW., May 1994, at 62 [hereinafter Note].

[4] AR 27-20, *supra* note 3, para. 1-9d.

[5] 28 U.S.C. § 2672 (1988); AR 27-20, *supra* note 3, ch. 4.

[6] 10 U.S.C. § 2733 (1988); AR 27-20, *supra* note 3, ch. 3.

[7] AR 27-20, *supra* note 3, para. 2-20c.

5. Property Damage will be strictly defined and will not include medical bills and lost wages, whether or not subrogated.

It is anticipated that the procedure will be used primarily in minor vehicle accidents. Furthermore, the practice in some area claims offices (ACO) of requiring a claimant to waive any PI claims prior to receiving payment for PD will not continue.

Examples of situations that lend readily to payment of the property damage are as follows:

1. A government owned vehicle (GOV) rear-ends a privately owned vehicle (POV) because the operator of the GOV was not paying attention. Minor PD results. Both vehicles are driven away and no injuries are reported at the scene. The ACO may proceed without contacting the AAO.

2. A GOV loses its brakes and hits the rear of a POV slowing for heavy traffic on a freeway. This in turn causes a five-POV chain collision. There is a total of ten persons involved, only one of whom is taken to a hospital. All POVs are driveable. The ACO should contact all ten persons for statements as to the extent of their injuries to determine whether the total predicted value of the incident will exceed $200,000. Other means may be used to make this determination, such as discussion with witnesses or police. The ACO must forward a mirror file[8] to the USARCS and then telephonically discuss the matter with the USARCS AAO.

3. A male service member driving his POV on a military installation is struck by a GOV because the GOV ran a traffic signal. The service member's spouse is a passenger and reports injuries. The service member files a claim for PD to his POV and for injuries to himself and loss of consortium of his spouse. The spouse files a PI claim. Both injuries are minor and valued within the ACO's monetary authority. The service member should be paid under the MCA for PD and loss of consortium only under the FTCA, provided that he agrees to relinquish his PI claim for his own injuries. Any claim by the service member under the FTCA for either PI or PD is barred by the Feres Doctrine; however, the incident to service bar under the MCA only bars a claim for PI, not PD. The spouse's PI claim should be paid under the FTCA. If the total predicted value of the incident exceeds $25,000, the ACO should discuss it with the USARCS AAO.

4. In a disputed liability accident between a GOV and POV, all persons involved are seriously injured. The total predicted value of the incident is well in excess of the ACO's authority. A first claim filed is from the insurer of the driver of the POV for payment the insurer made for damage to the POV as well as lost earnings and medical bills of the injured driver and passengers. Discussion between the ACO and AAO indicates that the United States liability is greater than fifty percent and the total value of the incident is less than $200,000. The insurer is properly subrogated under state law for all three items claimed and demands immediate payment. The insurer may be paid only for damage to the POV in an amount reflecting diminished liability of the costs of repairs to the United States vehicle.

The major purpose of this policy is to permit a claimant to be paid expeditiously for POV damage without using collision coverage. These payments must include all PD, including hidden damage and loss of use as discussed in the May 1994 Claims note.[9]

Direct any questions to the appropriate USARCS AAO; (301) 677-7009 (plus extension). Mr. Rouse.

Claims Notes

Disaster Claims Planning

Earthquakes! Forest Fires! Hurricanes! Tornadoes! Floods! Aircraft Crashes! Chemical, Nuclear, and Conventional Munitions Accidents! No military installation is totally immune from a disaster.[10] Is your claims office prepared to conduct domestic disaster relief operations?[11] Does your office have a Disaster Claims Plan?

[8] *Id.* para. 2-11b(3)(b).

[9] *See* Note, *supra* note 3.

[10] AR 27-20, *supra* note 3, Glossary, sec. II, Terms, defines "disaster" as: "A sudden and extraordinary calamity occasioned by activities of the Army, other than combat, resulting in extensive civilian property damage or personal injuries and creating a large number of potential claims."

[11] DEP'T OF ARMY, FIELD MANUAL 100-5, OPERATIONS 13-5 (14 June 1993). *See also* INTERNATIONAL AND OP. L. DIV., THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, JA 422, OPERATIONAL LAW HANDBOOK, tab S (1994).

The USARCS is responsible for developing and maintaining disaster claims plans Army wide.[12] The Commander, USARCS, is required to:

- Assist field claims offices in developing disaster claims plans.

- Develop and maintain plans for disasters in geographic areas not under the jurisdiction of an area claims authority and in which the Army has single service responsibility or in which the Army is likely to be the predominant Armed Force.

- Take initial action on claims arising in emergency situations.[13]

Many small installations and depots lack sufficient personnel and logistical resources to conduct disaster claims operations, so the responsibility falls on area claims offices.[14] Each head of an area claims office is required to "[d]evelop and maintain written plans for a disaster or civil disturbance. The plan should include a requirement for an advance party to assess the need for the presence of a special claims processing office."[15]

With today's greater emphasis on the Army's role in disaster relief operations, now is a good time to update disaster claims plans. A sample plan is found in *Department of the Army Pamphlet 27-162*.[16] The head of each area claims office should furnish a copy of the disaster claims plan to the USARCS.[17]

Disaster claims plans should adhere to the following regulatory requirements:

1. Claims arising out of emergencies, aircraft and missile accidents, natural disasters, or other situations that may be expected to generate a substantial number of claims in a short period of time normally will be investigated by the claims office responsible for the area in which the incident occurred.[18]

2. An area claims office may create a special claims processing office for emergencies and other specific short-term purposes.[19]

3. If a special claims processing office is provided for a disaster, then it must be supervised by an assigned judge advocate or claims attorney, to exercise delegated claims approval authority.[20]

4. The Commander, USARCS, should be notified before the dispatch of a special claims processing office created in response to a disaster.[21]

5. To preclude premature admissions of liability, no claim arising out of an emergency situation involving military weapons, equipment, or personnel will be paid without the concurrence of the Commander, USARCS.[22]

The USARCS Executive will serve as the point of contact for disaster claims planning. Additional guidance will be provided in future Claims Report notes. Lieutenant Colonel Millard.

1995 Claims Video Teleconferences

The USARCS will host a series of claims video teleconferences (VTCs) during 1995. The first Claims VTC was to be presented for all FORSCOM installations on 21 February, and was to be repeated for all TRADOC installations on 3 March. Thereafter, a single VTC will be presented in the months of April, June, August, October, and December 1995. Each VTC will be scheduled to begin between 1100 and 1400 Eastern Standard time, and will last for about two hours.

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[12] DEP'T OF ARMY, REG. 10-72, FIELD OPERATING AGENCIES OF THE JUDGE ADVOCATE GENERAL, para. 4-2 (20 Feb. 1989).

[13] AR 27-20, *supra* note 3, para. 1-7b(14)-(16).

[14] An area claims office is a principal office for the investigation and adjudication or settlement of claims within specified geographic areas. *Id.* para. 1-8a.

[15] *Id.* para. 1-7d(11).

[16] *See* DA PAM. 27-162, *supra* note 1, fig. 5-1.

[17] AR 27-20, *supra* note 3, para. 1-9c(2).

[18] *Id.* para. 2-3c.

[19] *Id.* para. 1-8c(4)(b).

[20] *Id.* para. 1-8c(5).

[21] *Id.* para. 1-8c(4)(b).

[22] *Id.* para. 2-3c.

The MACOMs have identified twelve TRADOC and twelve FORSCOM installations that will be scheduled to receive the live broadcast for each VTC:

- TRADOC: Benning, Bliss, Gordon, Huachuca, Jackson, Knox, Leavenworth, Leonard Wood, McClellan, Rucker, Sill, and Eustis.
- FORSCOM: Lewis, Hood, Bragg, Riley, Carson, Drum, Stewart, Campbell, Irwin, Polk, McPherson, and Sam Houston.

Claims personnel from offices in the vicinity of the USARCS are invited to join the VTC presenters at the Fort Meade, Maryland, Videoteleconference Center. Other claims personnel from installations not receiving a live broadcast will be invited to travel to the closest online VTC center, or to join in through audio hookup. On request, USARCS personnel will distribute videotapes of each VTC to field offices that are unable to participate in the live broadcast.

The focus of the first VTC was on personnel claims intake. The presentations in June and October also will concentrate on personnel claims and recovery. In April, August, and December the concentration will be on tort claims. For more information, please contact the USARCS Executive. Lieutenant Colonel Millard.

Guard and Reserve Affairs Items

Guard and Reserve Affairs Division, OTJAG

The Judge Advocate General's Continuing Legal Education (On-Site) Schedule Update

Following is an updated schedule of The Judge Advocate General's CLE On-Sites. If you have any questions concerning the On-Site schedule please direct them to the local action officer or CPT Eric G. Storey, Chief, Unit Liaison and Training Office, Guard and Reserve Affairs Division, Office of The Judge Advocate General, telephone (804) 972-6380.

THE JUDGE ADVOCATE GENERAL'S SCHOOL CONTINUING LEGAL EDUCATION (ON-SITE) TRAINING, AY 95

DATE	CITY, HOST UNIT AND TRAINING SITE	AC GO/RC GO SUBJECT/INSTRUCTOR/GRA REP		ACTION OFFICER
4-5 Mar 95	Columbia, SC	AC GO	MG Gray	MAJ Paul Conrad
	120th ARCOM	RC GO	BG Sagsveen	120th ARCOM
	Univ of SC Law School	Crim Law	MAJ Winn	Bldg. 9810, Lee Rd.
	Columbia, SC 29208	Ad & Civ	MAJ Hernicz	Fort Jackson, SC 29207
		GRA Rep	LTC Menk/CPT Storey	(803) 751-6152
10-12 Mar 95	Dallas/Fort Worth	AC GO	BG Huffman	COL Richard Tanner
	1st LSO	RC GO	BG Sagsveen	401 Ridgehaven
	Stouffer-Dallas	Int'l-Ops Law	LCDR Winthrop	Richardson, TX 75080
	2222 Stemmons Freeway	Crim Law	MAJ Burrell	(214) 991-2124
	Dallas, TX 75207	GRA Rep	LTC Hamilton	
11-12 Mar 95	Washington, DC	AC GO	MG Gray	CPT Robert J. Moore
	10th LSO	RC GO	BG Cullen	10th LSO
	NWC (Arnold Auditorium)	Int'l-Ops Law	MAJ Whitaker	5550 Dower House Road
	Fort Lesley J. McNair	Contract Law	MAJ Ellcessor	Washington, DC 20315
	Washington, DC 20319	GRA Rep	LTC Menk/CPT Storey	(301) 763-3211/2475

THE JUDGE ADVOCATE GENERAL'S
SCHOOL CONTINUING LEGAL EDUCATION (ON-SITE) TRAINING, AY 95 (Continued)

DATE	CITY, HOST UNIT AND TRAINING SITE	AC GO/RC GO SUBJECT/INSTRUCTOR/GRA REP		ACTION OFFICER
18-19 Mar 95	San Francisco, CA 6th LSO Radisson Hotel 1177 Airport Road Burlingame, ca 94010	AC GO RC GO Ad & Civ Crim Law GRA Rep	MG Nardotti BG Sagsveen, BG Lassart, BG Cullen MAJ Peterson LTC Bond COL Reyna	LTC Joe Piasta 717 College Avenue Second Floor Santa Rosa, CA 95404 (707) 544-5858
1-2 Apr 95	Indianapolis, IN National Guard Indianapolis War Memorial 421 North Meridian St. Indianapolis, IN 46204	AC GO RC GO Ad & Civ Crim Law GRA Rep	BG Magers BG Cullen MAJ Diner MAJ Kohlmann LTC Hamilton	COL George A. Hopkins 2002 South Holt Road Indianapolis, IN 46241 (317) 457-4349
7-9 Apr 95	Orlando, FL 174th LSO Airport Marriott 7499 Augusta National Dr. Orlando, FL 32822	AC GO RC GO Contract Law Int'l-Ops Law GRA Rep	MG Nardotti BG Lassart MAJ DeMoss LTC Winters Dr. Foley	MAJ John J. Copelan, Jr. Broward County Attorney 115 South Andrews Avenue Suite 423 Fort Lauderdale, Fl 33301 (305) 357-7600
29-30 Apr 95	Columbus, OH 83d ARCOM/9th LSO/ OH ARNG Best Western-Columbus North 888 East Dublin-Granville Rd. Columbus, OH 43229	AC GO RC GO Ad & Civ Crim Law GRA Rep	BG Cuthbert BG Lassart MAJ J. Frisk MAJ Wright COL Reyna	CPT Mark Otto 9th LSO 765 Taylor Station Rd. Blacklick, OH 43004 (614) 692-5434 DSN: 850-5434
5-7 May 95	Huntsville, AL 121st ARCOM Corps of Engineer Ctr. Huntsville, AL 35805	AC GO RC GO Contract Law Crim Law GRA Rep	MG Nardotti BG Cullen MAJ Hughes MAJ A. Frisk COL Reyna	LTC Bernard B. Downs, Jr. HHC, 3d Trans Bde 3415 McClellan Blvd. Anniston, AL 36201 (205) 939-0033
12-13 May 95	Gulf Shores, AL AL ARNG	AC GO RC GO Contract Law Int'l-Ops Law GRA Rep	 BG Cullen MAJ Hughes MAJ Martins Dr. Foley	COL Larry Craven Office of the Adj General ATTN: AL-JA P.O. Box 3711 Montgomery, AL 36109 (205) 271-7471
12-14 May 95	Kansas City, MO 89th ARCOM Westin Crown Center One Pershing Road Kansas City, MO 64108	AC GO RC GO Contract Law Ad & Civ GRA Rep	BG Magers BG Lassart MAJ Causey MAJ Jennings LTC Menk	MAJ Rick Tague 89th ARCOM Attn: AFRC-AKS-SJA 3130 Geo Washington Blvd. Wichita, KS 67210-1598 (316) 681-1759 X228

Professional Responsibility Notes

DA Standards of Conduct Office

Ethical Awareness

Army Rule 1.8(i)
(Conflict of Interest)

Both parties in a domestic relations dispute cannot safely be represented by any one lawyer, by any one legal office, and especially not by related lawyers; the risks of unmet expectations and failure simply are too great.

A lawyer related to another lawyer . . . shall not represent a client in a representation directly adverse to a person who the lawyer knows is represented by the other lawyer except on the client's consent after consultation regarding the relationship.

Army Regulation 27-3
(Legal Assistance)

Attorneys from the same legal office are discouraged from providing legal assistance to both spouses involved in a domestic dispute.

Military legal offices are careful to avoid representing both spouses in family matters. At least one of the spouses is likely to complain later—even though the lawyers were friendly, prompt, courteous, uncondescending, communicative, and absolutely ethical.

Captains Adam and Eve Bond

In an actual case,[1] Captains Adam and Eve Bond (husband and wife) became mired in ethical quicksand after they individually assisted domestic relations clients, at nonconcurrent times, over a two-month period. The Bonds were legal assistance attorneys (LAA) assigned to different overseas units. They worked in different legal offices located approximately three miles apart. Even though they both acted ethically, the aftermath of their efforts was a professional responsibility inquiry.

Sergeant and Mrs. Smithers

After Sergeant Smithers left his wife and moved in with another woman, Mrs. Smithers decided to divorce Sergeant Smithers. Mrs. Smithers continued to use Sergeant Smithers' assigned government quarters, but otherwise was forced to rely on the kindness of strangers.

December 15

On December 15, a disturbance occurred between Sergeant and Mrs. Smithers when Sergeant Smithers tried to retrieve his uniforms and equipment from the quarters. Sergeant Smithers was accompanied by his unit's Executive Officer (XO) and First Sergeant. After that disturbance, the Army issued travel orders, dated February 15, for Mrs. Smithers to leave the country.

December 26

On December 26, Mrs. Smithers entered the legal office where Captain Adam Bond was the only attorney on duty. He asked Mrs. Smithers to come back after the holidays because his appointment book was full and because all of the other attorneys were on leave. However, Mrs. Smithers convinced him to give her an emergency appointment for the next day.

December 27

On December 27, Mrs. Smithers met with Captain Adam Bond. They discussed her early return to the United States, property division, assumption of indebtedness, and separation agreements. Additionally, Mrs. Smithers asked him to set up an appointment for her to visit the XO, which he did. After ninety minutes, she announced that she would get a civilian attorney to handle her case. Captain Adam Bond gave her a list of local civilian attorneys and said good-bye, believing that the attorney-client relationship had ended.

The same day, Sergeant Smithers met with Captain Eve Bond, who was his unit's LAA. She was the only attorney available at the branch legal office. However, when she learned that Mrs. Smithers had seen her husband, she told Sergeant Smithers that she would not represent him. She informed him that he should make an appointment at another legal office, which was located many miles away.

December 28

After Sergeant Smithers told his XO that Captain Eve Bond would not represent him, the XO telephoned her and pleaded for her to arrange for local legal assistance. The XO explained that he did not want the unit to have to drive Sergeant Smithers to a distant legal office because almost everyone was on holiday leave. Captain Eve Bond telephoned her husband and learned that he no longer had an attorney-client relationship with Mrs. Smithers. She then undertook

[1] The names are fictitious.

the representation and drafted a proposed separation agreement. Over the next six weeks, Sergeant Smithers asked her to make numerous changes to the proposed agreement.

February 14

Early on February 14, Sergeant Smithers went to the legal office and made a last-minute change to the proposed property settlement. Under the new terms, rather than his wife getting the car and loan, he took them. Sergeant Smithers signed the document, and Captain Eve Bond notarized his signature. She told him to have his wife sign the agreement before a notary.

The XO was monitoring events and asked for the First Sergeant's assistance to prevent any more disturbances. The First Sergeant took Sergeant and Mrs. Smithers to the legal office where Captain Adam Bond was assigned for Mrs. Smithers's signature and notarization.[2] They arrived late; the office was being locked up for the day. Captain Adam Bond asked them to come back the next day, but when he learned that Mrs. Smithers was leaving the country, he agreed to notarize her signature. However, he warned her that as a notary, he was acting in a ministerial capacity only. He told her that if she had any questions about the separation agreement that she had to see a different lawyer. Mrs. Smithers signed the revised document. The next day, she went to the airport, got on the plane, and left the country. She soon began to regret signing the separation agreement.

Inspector General Complaints

After some reflection, Mrs. Smithers complained to the Inspector General (IG) about the Army's losing her identification card applications, losing her furniture shipments, losing and rifling through her mail, and failing to stop her husband's adultery. One of those IG complaints was forwarded to the Standards of Conduct Office because it also alleged that Mrs. Smithers had been denied legal services and made the victim of a conspiracy between Sergeant Smithers, judge advocates, and the Army to coerce her to sign a "switched" separation agreement.

Mrs. Smithers thought that she had been given "the bum's rush" and forced into signing the papers because everyone—the lawyers, the XO, the First Sergeant, and her husband—knew that she was leaving the country and had no money. She apparently believed that the travel orders had been issued as part of a conspiracy to get rid of her. She also expected the Army to punish her husband for his actions.

A preliminary screening official (PSO), appointed under provisions of *Army Regulation 27-1*, chapter 7,[3] concluded that the allegations were unfounded. The PSO found that no conspiracy existed and that Mrs. Smithers was not denied legal services. Instead, the PSO found that she was provided quick and responsive service during a time of reduced office staffing.

Although the attorneys involved did not act unethically, the situation created too great an opportunity for misunderstanding and resentment. Clients can have unreasonably high expectations. They often will hold their lawyers responsible for results that fall short of these expectations.

> Probably no area of legal work has more, or deeper, malpractice risks than the divorce and child-custody specialties. . . .
>
> Because family-law litigants are often highly agitated, many things can go wrong. The most frequent claims arise from representing both sides and failing to marshal assets. A lawyer often finds himself torn between his ethical duty to represent a spouse zealously and the divorcing parties' wish to handle many of the issues themselves or not to pick each other's bones clean. After the divorce is finalized and some time has passed, however, it is not unusual for one of the ex-spouses to come to believe that he or she could have done better.[4]

Additionally, in order to avoid potential conflicts, a 1977 American Bar Association ethics opinion discouraged a single military legal assistance office from representing both parties.[5] Army lawyers positively enhance the public's perception of the legal profession by prudently steering clear of these problems.[6] Mr. Eveland.

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[2]The supervisory judge advocate has a role in preventing these types of situations. *See* DEP'T OF ARMY, REG. 27-26, LEGAL SERVICES: RULES OF PROFESSIONAL CONDUCT FOR LAWYERS (1 May 1992). Rule 5.1 assigns all supervisory judge advocates the duty of ensuring compliance with the Army Rules. Rule 5.1 specifically requires that supervisors train subordinates. Additionally, supervisors should create standard operating procedures to prevent conflicts from arising.

[3]DEP'T OF ARMY, REG. 27-1, LEGAL SERVICES: JUDGE ADVOCATE LEGAL SERVICE (15 Sept. 1989).

[4]Gary Grasso, *Legal Malpractice: How to Keep Your Clients from Suing You*, A.B.A. J., Oct. 1989, at 98.

[5]ABA Comm. on Ethics and Professional Responsibility, Formal Op. 343 (1977).

[6]"Army policy discourages attorneys from the same legal office from providing legal assistance to both spouses involved in a domestic dispute (other than legal referral or provision of a list of attorneys . . .)." DEP'T OF ARMY, REG. 27-3, LEGAL SERVICES: LEGAL ASSISTANCE, para. 4-9c (30 Sept. 1992). "The attorney making the referral should, whenever possible, personally contact the attorney to whom the referral is being made to ensure that assistance will be provided." *Id.* para. 3-7h(6)(b)(1).

CLE News

1. Resident Course Quotas

Attendance at resident CLE courses at The Judge Advocate General's School (TJAGSA) is restricted to those students who have a confirmed reservation. Reservations for TJAGSA CLE courses are managed by the Army Training Requirements and Resources System (ATRRS), the Army-wide automated quota management system. **If you do not have a confirmed reservation in ATRRS, you do not have a reservation for a TJAGSA CLE course.**

Active duty service members must obtain reservations through their directorates of training or through equivalent agencies. Reservists must obtain reservations through their unit training offices or, if they are nonunit reservists, through ARPERCEN, ATTN: ARPC-ZJA-P, 9700 Page Boulevard, St. Louis, MO 63132-5200. Army National Guard personnel request reservations through their unit training offices.

When requesting a reservation, you should know the following:

TJAGSA School Code—181

Course Name and Number—(for example—133 Contract Attorneys' Course 5F-F10)

Class Number—(for example—133 Contract Attorneys' Course 5F-F10)

To verify if you have a confirmed reservation, ask your training office to provide you a screen print of the ATRRS R1 screen showing by-name reservations.

2. TJAGSA CLE Course Schedule

1995

3-7 April: 129th Senior Officers Legal Orientation Course (5F-F1).

17-20 April: 1995 Reserve Component Judge Advocate Workshop (5F-F56).

17-28 April: 3d Criminal Law Advocacy Course (5F-F34).

24-28 April: 21st Operational Law Seminar (5F-F47).

1-5 May: 6th Law for Legal NCOs Course (512-71D/E/20/30).

1-5 May: 6th Installation Contracting Course (5F-F18).

15-19 May: 41st Fiscal Law Course (5F-F12).

15 May-2 June: 38th Military Judge Course (5F-F33).

22-26 May: 42d Fiscal Law Course (5F-F12).

22-26 May: 47th Federal Labor Relations Course (5F-F22).

5-9 June: 1st Intelligence Law Workshop (5F-F41).

5-9 June: 130th Senior Officers Legal Orientation Course (5F-F1).

12-16 June: 25th Staff Judge Advocate Course (5F-F52).

19-30 June: JATT Team Training (5F-F57).

19-30 June: JAOAC (Phase II) (5F-F55).

5-7 July: Professional Recruiting Training Seminar.

5-7 July: 26th Methods of Instruction Course (5F-F70).

10-14 July: 6th Legal Administrators Course (7A-550A1).

10 July-15 September: 137th Basic Course (5-27-C20).

17-21 July: 2d JA Warrant Officer Basic Course (7A-550A0).

24-28 July: Fiscal Law Off-Site (Maxwell AFB).

31 July-16 May 1996: 44th Graduate Course (5-27-C22).

31 July-11 August: 135th Contract Attorneys' Course (5F-F10).

14-18 August: 13th Federal Litigation Course (5F-F29).

14-18 August: 6th Senior Legal NCO Management Course (512-71D/E/40/50).

21-25 August: 60th Law of War Workshop (5F-F42).

21-25 August: 131st Senior Officers Legal Orientation Course (5F-F1).

28 August-1 September: 22d Operational Law Seminar (5F-F47).

6-8 September: USAREUR Legal Assistance CLE (5F-F23E).

11-15 September: USAREUR Administrative Law CLE (5F-F24E).

11-15 September: 2d Federal Courts and Boards Litigation Course (5F-F14).

18-29 September: 4th Criminal Law Advocacy Course (5F-F34).

3. Civilian Sponsored CLE Courses

April

20 April: LAMP CLE Seminar, hosted by the United States Coast Guard, Governor's Island, New York, New York (312) 988-5760.

June 1995

1-2, GWU: A Practical Introduction to Government Contracting, Washington, D.C.

5-8, ESI: Business Process Reengineering, Washington, D.C.

5-9, ESI: Scheduling and Cost Control, London, England.

6-9, ESI: Contract Pricing, Denver, CO.

9-10, PBI: 12th Annual Criminal Law Symposium, Harrisburg, PA.

12, GWU: Contract Award Protests: GAO, Washington, D.C.

12-16, GWU: Formation of Government Contracts, Seattle, WA.

12-16, ESI: Operating Practices in Contract Administration, Washington, D.C.

12-16, ESI: Contracting for Project Managers, Dallas, TX.

12-16, ESI: Project Leadership, Management, and Communications, Washington, D.C.

12-16, ESI: Risk Management, San Diego, CA.

13, GWU: Contract Award Protests: GSBCA, Washington, D.C.

13-16, ESI: Advanced Source Selection: Evaluation Factors, Scoring Procedures, and Proposal Evaluation Techniques, Washington, D.C.

19-21, ESI: Continuous Improvement and Total Quality Management, London, England.

19-23, ESI: Federal Contracting Basics, San Diego, CA.

19-23, ESI: Accounting for Costs on Government Contracts, Washington, D.C.

19-23, ESI: Managing Projects in Organizations, Washington, D.C.

19-23, ESI: Scheduling and Cost Control, Dallas, TX.

26-28, GWU: ADP Contract Law, Washington, D.C.

26-30, ESI: Defense Program Management, Washington, D.C.

For further information on civilian courses, please contact the institution offering the course. The addresses are listed below:

AAJE: American Academy of Judicial Education, 1613 15th Street, Suite C, Tuscaloosa, AL 35404. (205) 391-9055.

ABA: American Bar Association, 750 North Lake Shore Drive, Chicago, IL 60611. (312) 988-6200.

ALIABA: American Law Institute-American Bar Association Committee on Continuing Professional Education, 4025 Chestnut Street, Philadelphia, PA 19104-3099. (800) CLE-NEWS; (215) 243-1600.

ASLM: American Society of Law and Medicine, Boston University School of Law, 765 Commonwealth Avenue, Boston, MA 02215. (617) 262-4990.

CCEB: Continuing Education of the Bar, University of California Extension, 2300 Shattuck Avenue, Berkeley, CA 94704. (510) 642-3973.

CLA: Computer Law Association, Inc., 3028 Javier Road, Suite 500E, Fairfax, VA 22031. (703) 560-7747.

CLESN: CLE Satellite Network, 920 Spring Street, Springfield, IL 62704. (217) 525-0744, (800) 521-8662.

ESI: Educational Services Institute, 5201 Leesburg Pike, Suite 600, Falls Church, VA 22041-3203. (703) 379-2900.

FBA: Federal Bar Association, 1815 H Street, NW., Suite 408, Washington, D.C. 20006-3697. (202) 638-0252.

FB: Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300. (904) 222-5286.

GICLE: The Institute of Continuing Legal Education in Georgia, P.O. Box 1885, Athens, GA 30603. (706) 369-5664.

GII: Government Institutes, Inc., 966 Hungerford Drive, Suite 24, Rockville, MD 20850. (301) 251-9250.

GWU: Government Contracts Program, The George Washington University, National Law Center, 2020 K Street, N.W., Room 2107, Washington, D.C. 20052. (202) 994-5272.

IICLE: Illinois Institute for CLE, 2395 W. Jefferson Street, Springfield, IL 62702. (217) 787-2080.

LRP: LRP Publications, 1555 King Street, Suite 200, Alexandria, VA 22314. (703) 684-0510; (800) 727-1227.

LSU: Louisiana State University, Center of Continuing Professional Development, Paul M. Herbert Law Center, Baton Rouge, LA 70803-1000. (504) 388-5837.

MICLE: Institute of Continuing Legal Education, 1020 Greene Street, Ann Arbor, MI 48109-1444. (313) 764-0533; (800) 922-6516.

MLI: Medi-Legal Institute, 15301 Ventura Boulevard, Suite 300, Sherman Oaks, CA 91403. (800) 443-0100.

NCDA: National College of District Attorneys, University of Houston Law Center, 4800 Calhoun Street, Houston, TX 77204-6380. (713) 747-NCDA.

NITA: National Institute for Trial Advocacy, 1507 Energy Park Drive, St. Paul, MN 55108. (800) 225-6482; (612) 644-0323 in (MN and AK).

NJC: National Judicial College, Judicial College Building, University of Nevada, Reno, NV 89557. (702) 784-6747.

NMTLA: New Mexico Trial Lawyers' Association, P.O. Box 301, Albuquerque, NM 87103. (505) 243-6003.

PBI: Pennsylvania Bar Institute, 104 South Street, P.O. Box 1027, Harrisburg, PA 17108-1027. (800) 932-4637; (717) 233-5774.

PLI: Practising Law Institute, 810 Seventh Avenue, New York, NY 10019. (212) 765-5700.

TBA: Tennessee Bar Association, 3622 West End Avenue, Nashville, TN 37205. (615) 383-7421.

TLS: Tulane Law School, Tulane University CLE, 8200 Hampson Avenue, Suite 300, New Orleans, LA 70118. (504) 865-5900.

UMLC: University of Miami Law Center, P.O. Box 248087, Coral Gables, FL 33124. (305) 284-4762.

4. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Jurisdiction	Reporting Month
Alabama**	31 December annually
Arizona	15 July annually
Arkansas	30 June annually
California*	1 February annually
Colorado	Anytime within three-year period
Delaware	31 July biennially
Florida**	Assigned month triennially
Georgia	31 January annually
Idaho	Admission date triennially
Indiana	31 December annually
Iowa	1 March annually
Kansas	1 July annually
Kentucky	30 June annually
Louisiana**	31 January annually
Michigan	31 March annually
Minnesota	30 August triennially
Mississippi**	1 August annually
Missouri	31 July annually
Montana	1 March annually
Nevada	1 March annually
New Hampshire**	1 August annually
New Mexico	30 days after program
North Carolina**	28 February annually
North Dakota	31 July annually
Ohio*	31 January biennially
Oklahoma**	15 February annually
Oregon	Anniversary of date of birth—new admittees and reinstated members report after an initial one-year period; thereafter triennially
Pennsylvania**	Annually as assigned
Rhode Island	30 June annually
South Carolina**	15 January annually
Tennessee*	1 March annually
Texas	Last day of birth month annually
Utah	31 December biennially
Vermont	15 July biennially
Virginia	30 June annually
Washington	31 January triennially
West Virginia	30 June biennially
Wisconsin*	31 December biennially
Wyoming	30 January annually

For addresses and detailed information, see the July 1994 issue of *The Army Lawyer*.

*Military exempt

**Military must declare exemption

Current Material of Interest

1. TJAGSA Materials Available Through Defense Technical Information Center

Each year, TJAGSA publishes deskbooks and materials to support resident instruction. Much of this material is useful to judge advocates and government civilian attorneys who are unable to attend courses in their practice areas. The School receives many requests each year for these materials. Because the distribution of these materials is not in the School's mission, TJAGSA does not have the resources to provide these publications.

To provide another avenue of availability, some of this material is being made available through the Defense Technical Information Center (DTIC). An office may obtain this material in two ways. The first is through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries, they may be free users. The second way is for the office or organization to become a government user. Government agency users pay five dollars per hard copy for reports of 1-100 pages and seven cents for each additional page over 100, or ninety-five cents per fiche copy. Overseas users may obtain one copy of a report at no

charge. The necessary information and forms to become registered as a user may be requested from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314-6145, telephone: commercial (703) 274-7633, DSN 284-7633.

Once registered, an office or other organization may open a deposit account with the National Technical Information Service to facilitate ordering materials. Information concerning this procedure will be provided when a request for user status is submitted.

Users are provided biweekly and cumulative indices. These indices are classified as a single confidential document and mailed only to those DTIC users whose organizations have a facility clearance. This will not affect the ability of organizations to become DTIC users, nor will it affect the ordering of TJAGSA publications through DTIC. All TJAGSA publications are unclassified and the relevant ordering information, such as DTIC numbers and titles, will be published in *The Army Lawyer*. The following TJAGSA publications are available through DTIC. The nine-character identifier beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications.

Contract Law

AD A265755 Government Contract Law Deskbook vol. 1/JA-501-1-93 (499 pgs).

AD A265756 Government Contract Law Deskbook, vol. 2/JA-501-2-93 (481 pgs).

AD A265777 Fiscal Law Course Deskbook/JA-506(93) (471 pgs).

Legal Assistance

AD B092128 USAREUR Legal Assistance Handbook/JAGS-ADA-85-5 (315 pgs).

AD A263082 Real Property Guide—Legal Assistance/JA-261(93) (293 pgs).

AD A281240 Office Directory/JA-267(94) (95 pgs).

AD B164534 Notarial Guide/JA-268(92) (136 pgs).

AD A282033 Preventive Law/JA-276(94) (221 pgs).

AD A266077 Soldiers' and Sailors' Civil Relief Act Guide/JA-260(93) (206 pgs).

AD A266177 Wills Guide/JA-262(93) (464 pgs).

AD A268007 Family Law Guide/JA 263(93) (589 pgs).

AD A280725 Office Administration Guide/JA 271(94) (248 pgs).

AD B156056 Legal Assistance: Living Wills Guide/JA-273-91 (171 pgs).

AD A269073 Model Income Tax Assistance Guide/JA 275-(93) (66 pgs).

AD A283734 Consumer Law Guide/JA 265(94) (613 pgs).

AD A274370 Tax Information Series/JA 269(94) (129 pgs).

AD A276984 Deployment Guide/JA-272(94) (452 pgs).

AD A275507 Air Force All States Income Tax Guide—January 1994.

Administrative and Civil Law

AD A199644 The Staff Judge Advocate Officer Manager's Handbook/ACIL-ST-290.

AD A285724 Federal Tort Claims Act/JA 241(94) (156 pgs).

AD A277440 Environmental Law Deskbook, JA-234-1(93) (492 pgs).

AD A283079 Defensive Federal Litigation/JA-200(94) (841 pgs).

AD A255346 Reports of Survey and Line of Duty Determinations/JA 231-92 (89 pgs).

AD A283503 Government Information Practices/JA-235(94) (321 pgs).

AD A259047 AR 15-6 Investigations/JA-281(92) (45 pgs).

Labor Law

AD A286233 The Law of Federal Employment/JA-210(94) (358 pgs).

AD A273434 The Law of Federal Labor-Management Relations/JA-211(93) (430 pgs).

Developments, Doctrine, and Literature

AD A254610 Military Citation, Fifth Edition/JAGS-DD-92 (18 pgs).

Criminal Law

AD A274406 Crimes and Defenses Deskbook/JA 337(93) (191 pgs).

AD A274541 Unauthorized Absences/JA 301(93) (44 pgs).

AD A274473 Nonjudicial Punishment/JA-330(93) (40 pgs).

AD A274628 Senior Officers Legal Orientation/JA 320(94) (297 pgs).

AD A274407 Trial Counsel and Defense Counsel Handbook/JA 310(93) (390 pgs).

AD A274413 United States Attorney Prosecutions/JA-338(93) (194 pgs).

International and Operational Law

AD A284967 Operational Law Handbook/JA 422(94) (273 pgs).

Reserve Affairs

AD B136361 Reserve Component JAGC Personnel Policies Handbook/JAGS-GRA-89-1 (188 pgs).

The following CID publication also is available through DTIC:

AD A145966 USACIDC Pam 195-8, Criminal Investigations, Violation of the U.S.C. in Economic Crime Investigations (250 pgs).

Those ordering publications are reminded that they are for government use only.

*Indicates new publication or revised edition.

2. Regulations and Pamphlets

Obtaining Manuals for Courts-Martial, *DA Pamphlets, Army Regulations, Field Manuals, and Training Circulars.*

(1) The U.S. Army Publications Distribution Center (USAPDC) at Baltimore stocks and distributes DA publications and blank forms that have Army-wide use. Its address is:

Commander
U.S. Army Publications
Distribution Center
2800 Eastern Blvd.
Baltimore, MD 21220-2896

(2) Units must have publications accounts to use any part of the publications distribution system. The following extract from *Department of the Army Regulation 25-30, The Army Integrated Publishing and Printing Program,* paragraph 12-7c (28 February 1989), is provided to assist Active, Reserve, and National Guard units.

The units below are authorized publications accounts with the USAPDC.

(*1*) *Active Army.*

(*a*) *Units organized under a PAC.* A PAC that supports battalion-size units will request a consolidated publications account for the entire battalion except when subordinate units in the battalion are geographically remote. To establish an account, the PAC will forward a DA Form 12-R (Request for Establishment of a Publications Account) and supporting DA 12-series forms through their DCSIM or DOIM, as appropriate, to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. The PAC will manage all accounts established for the battalion it supports. (Instructions for the use of DA 12-series forms and a reproducible copy of the forms appear in DA Pam 25-33.)

(*b*) *Units not organized under a PAC.* Units that are detachment size and above may have a publications account. To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their DCSIM or DOIM, as appropriate, to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(*c*) *Staff sections of FOAs, MACOMs, installations, and combat divisions.* These staff sections may establish a single account for each major staff element. To establish an account, these units will follow the procedure in (*b*) above.

(2) *ARNG units that are company size to State adjutants general.* To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their State adjutants general to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(*3*) *USAR units that are company size and above and staff sections from division level and above.* To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation and CONUSA to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(*4*) *ROTC elements.* To establish an account, ROTC regions will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation and TRADOC DCSIM to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. Senior and junior ROTC units will submit a DA Form 12-R

and supporting DA 12-series forms through their supporting installation, regional headquarters, and TRADOC DCSIM to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

Units not described in [the paragraphs] above also may be authorized accounts. To establish accounts, these units must send their requests through their DCSIM or DOIM, as appropriate, to Commander, USAPPC, ATTN: ASQZ-NV, Alexandria, VA 22331-0302.

Specific instructions for establishing initial distribution requirements appear in DA Pam 25-33.

If your unit does not have a copy of *DA Pam 25-33*, you may request one by calling the Baltimore USAPDC at (410) 671-4335.

(3) Units that have established initial distribution requirements will receive copies of new, revised, and changed publications as soon as they are printed.

(4) Units that require publications that are not on their initial distribution list can requisition publications using *DA Form 4569*. All *DA Form 4569* requests will be sent to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. You may reach this office at (410) 671-4335.

(5) Civilians can obtain DA Pams through the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, Virginia 22161. You may reach this office at (703) 487-4684.

(6) Navy, Air Force, and Marine Corps judge advocates can request up to ten copies of DA Pams by writing to USAPDC, ATTN: DAIM-APC-BD, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. You may reach this office at (410) 671-4335.

3. LAAWS Bulletin Board Service

a. The Legal Automation Army-Wide System (LAAWS) operates an electronic bulletin board (BBS) primarily dedicated to serving the Army legal community in providing Army access to the LAAWS BBS, while also providing DOD-wide access. Whether you have Army access or DOD-wide access, all users will be able to download the TJAGSA publications that are available on the LAAWS BBS.

b. Access to the LAAWS BBS:

(1) Army access to the LAAWS BBS is currently restricted to the following individuals (who can sign on by dialing commercial (703) 806-5772, or DSN 656-5772):

(a) Active duty Army judge advocates;

(b) Civilian attorneys employed by the Department of the Army;

(c) Army Reserve and Army National Guard (NG) judge advocates on active duty, or employed by the federal government;

(d) Army Reserve and Army NG judge advocates *not* on active duty (access to OPEN and RESERVE CONF only);

(e) Active, Reserve, or NG Army legal administrators; Active, Reserve, or NG enlisted personnel (MOS 71D/71E);

(f) Civilian legal support staff employed by the Army Judge Advocate General's Corps;

(g) Attorneys (military and civilian) employed by certain supported DOD agencies (e.g. DLA, CHAMPUS, DISA, Headquarters Services Washington);

(h) Individuals with approved, written exceptions to the access policy.

Requests for exceptions to the access policy should be submitted to:

LAAWS Project Office
Attn: LAAWS BBS SYSOPS
9016 Black Rd, Ste 102
Fort Belvoir, VA 22060-6208

(2) DOD-wide access to the LAAWS BBS currently is restricted to the following individuals (who can sign on by dialing commercial (703) 806-5791, or DSN 656-5791):

All DOD personnel dealing with military legal issues.

c. The telecommunications configuration is: 9600/2400/1200 baud; parity-none; 8 bits; 1 stop bit; full duplex; Xon/Xoff supported; VT100/102 or ANSI terminal emulation. After signing on, the system greets the user with an opening menu. Members need only answer the prompts to call up and download desired publications. The system will ask new users to answer several questions and tell them they can use the LAAWS BBS after they receive membership confirmation, which takes approximately twenty-four to forty-eight hours. *The Army Lawyer* will publish information on new publications and materials as they become available through the LAAWS BBS.

d. *Instructions for Downloading Files from the LAAWS BBS.*

(1) Log onto the LAAWS BBS using ENABLE, PROCOMM, or other telecommunications software, and the communications parameters listed in subparagraph c, above.

(2) If you have never downloaded files before, you will need the file decompression utility program that the LAAWS BBS uses to facilitate rapid transfer over the phone lines. This program is known as the PKUNZIP utility. For Army access users, to download it onto your hard drive, take the following actions (DOD-wide access users will have to obtain a copy from their sources) after logging on:

(a) When the system asks, "Main Board Command?" Join a conference by entering [j].

(b) From the Conference Menu, select the Automation Conference by entering [12] and hit the enter key when asked to view other conference members.

(c) Once you have joined the Automation Conference, enter [d] to Download a file off the Automation Conference menu.

(d) When prompted to select a file name, enter [pkz110.exe]. This is the PKUNZIP utility file.

(e) If prompted to select a communications protocol, enter [x] for X-modem protocol.

(f) The system will respond by giving you data such as download time and file size. You should then press the F10 key, which will give you a top-line menu. If you are using ENABLE 3.XX from this menu, select [f] for Files, followed by [r] for Receive, followed by [x] for X-modem protocol. The menu will then ask for a file name. Enter [c:\pkz110.exe].

(g) If you are using ENABLE 4.0 select the PROTOCOL option and select which protocol you wish to use X-modem-checksum. Next select the RECEIVE option and enter the file name "pkz110.exe" at the prompt.

(h) The LAAWS BBS and your computer will take over from here. Downloading the file takes about fifteen to twenty minutes. ENABLE will display information on the progress of the transfer as it occurs. Once the operation is complete the BBS will display the message "File transfer completed" and information on the file. Your hard drive now will have the compressed version of the decompression program needed to explode files with the ".ZIP" extension.

(i) When the file transfer is complete, enter [a] to Abandon the conference. Then enter [g] for Good-bye to log-off the LAAWS BBS.

(j) To use the decompression program, you will have to decompress, or "explode," the program itself. To accomplish this, boot-up into DOS and enter [pkz110] at the C:\> prompt. The PKUNZIP utility will then execute, converting its files to usable format. When it has completed this process, your hard drive will have the usable, exploded version of the PKUNZIP utility program, as well as all of the compression/decompression utilities used by the LAAWS BBS.

(3) To download a file, after logging onto the LAAWS BBS, take the following steps:

(a) When asked to select a "Main Board Command?" enter [d] to Download a file.

(b) Enter the name of the file you want to download from subparagraph c, below. A listing of available files can be viewed by selecting File Directories from the main menu.

(c) When prompted to select a communications protocol, enter [x] for X-modem (ENABLE) protocol.

(d) After the LAAWS BBS responds with the time and size data, you should press the F10 key, which will give you the ENABLE top-line menu. If you are using ENABLE 3.XX select [f] for Files, followed by [r] for Receive, followed by [x] for X-modem protocol. If you are using ENABLE 4.0 select the PROTOCOL option and select which protocol you wish to use X-modem-checksum. Next select the RECEIVE option.

(e) When asked to enter a file name enter [c:\xxxxx.yyy] where xxxxx.yyy is the name of the file you wish to download.

(f) The computers take over from here. Once the operation is complete, the BBS will display the message "File transfer completed.." and information on the file. The file you downloaded will have been saved on your hard drive.

(g) After the file transfer is complete, log-off of the LAAWS BBS by entering [g] to say Good-bye.

(4) To use a downloaded file, take the following steps:

(a) If the file was not compressed, you can use it in ENABLE without prior conversion. Select the file as you would any ENABLE word processing file. ENABLE will give you a bottom-line menu containing several other word processing languages. From this menu, select "ASCII." After the document appears, you can process it like any other ENABLE file.

(b) If the file was compressed (having the ".ZIP" extension) you will have to "explode" it before entering the ENABLE program. From the DOS operating system C:\> prompt, enter [pkunzip{space}xxxxx.zip] (where "xxxxx.zip" signifies the name of the file you downloaded from the LAAWS BBS). The PKUNZIP utility will explode the compressed file and make a new file with the same name, but with a new ".DOC" extension. Now enter ENABLE and call up the exploded file "XXXXX.DOC", by following instructions in paragraph (4)(a), above.

e. *TJAGSA Publications Available Through the LAAWS BBS.* The following is a current list of TJAGSA publications available for downloading from the LAAWS BBS (Note that the date UPLOADED is the month and year the file was made

available on the BBS; publication date is available within each publication):

FILE NAME	*UPLOADED*	*DESCRIPTION*
RESOURCE.ZIP	June 1994	A Listing of Legal Assistance Resources, June 1994.
ALLSTATE.ZIP	January 1994	1994 AF AllStates Income Tax Guide for use with 1993 state income tax returns, January 1994.
ALAW.ZIP	June 1990	*Army Lawyer/Military Law Review* Database ENABLE 2.15. Updated through the 1989 *Army Lawyer* Index. It includes a menu system and an explanatory memorandum, ARLAWMEM.WPF.
BBS-POL.ZIP	December 1992	Draft of LAAWS BBS operating procedures for TJAGSA policy counsel representative.
BULLETIN.ZIP	January 1994	List of educational television programs maintained in the video information library at TJAGSA of actual classroom instructions presented at the school and video productions, November 1993.
CLG.EXE	December 1992	Consumer Law Guide Excerpts. Documents were created in Word Perfect 5.0 or Harvard Graphics 3.0 and zipped into executable file.
DEPLOY.EXE	December 1992	Deployment Guide Excerpts. Documents were created in Word Perfect 5.0 and zipped into executable file.
FOIAPT1.ZIP	May 1994	Freedom of Information Act Guide and Privacy Act Overview, September 1993.
FOIAPT.2.ZIP	June 1994	Freedom of Information Act Guide and Privacy Act Overview, September 1993.
FSO 201.ZIP	October 1992	Update of FSO Automation Program. Download to hard only source disk, unzip to floppy, then A:INSTALLA or B:INSTALLB.
JA200A.ZIP	August 1994	Defensive Federal Litigation—Part A, August 1994.
JA200B.ZIP	August 1994	Defensive Federal Litigation—Part B, August 1994.
JA210.ZIP	November 1994	Law of Federal Employment, September 1994.
JA211.ZIP	January 1994	Law of Federal Labor-Management Relations, November 1993.
JA231.ZIP	October 1992	Reports of Survey and Line of Duty Determinations—Programmed Instruction.
JA234-1.ZIP	February 1994	Environmental Law Deskbook, Volume 1, February 1994.
JA235.ZIP	August 1994	Government Information Practices Federal Tort Claims Act, July 1994.
JA241.ZIP	September 1994	Federal Tort Claims Act, August 1994.
JA260.ZIP	March 1994	Soldiers' & Sailors' Civil Relief Act, March 1994.
JA261.ZIP	October 1993	Legal Assistance Real Property Guide, June 1993.
JA262.ZIP	April 1994	Legal Assistance Wills Guide.

FILE NAME	UPLOADED	DESCRIPTION
JA263.ZIP	August 1993	Family Law Guide, August 1993.
JA265A.ZIP	June 1994	Legal Assistance Consumer Law Guide—Part A, May 1994.
JA265B.ZIP	June 1994	Legal Assistance Consumer Law Guide—Part B, May 1994.
JA267.ZIP	July 1994	Legal Assistance Office Directory, July 1994.
JA268.ZIP	March 1994	Legal Assistance Notarial Guide, March 1994.
JA269.ZIP	January 1994	Federal Tax Information Series, December 1993.
JA271.ZIP	May 1994	Legal Assistance Office Administration Guide, May 1994.
JA272.ZIP	February 1994	Legal Assistance Deployment Guide, February 1994.
JA274.ZIP	March 1992	Uniformed Services Former Spouses' Protection Act—Outline and References.
JA275.ZIP	August 1993	Model Tax Assistance Program.
JA276.ZIP	July 1994	Preventive Law Series, July 1994.
JA281.ZIP	November 1992	15-6 Investigations.
JA285.ZIP	January 1994	Senior Officers Legal Orientation Deskbook, January 1994.
JA290.ZIP	March 1992	SJA Office Manager's Handbook.
JA301.ZIP	January 1994	Unauthorized Absences Programmed Text, August 1993.
JA310.ZIP	October 1993	Trial Counsel and Defense Counsel Handbook, May 1993.
JA320.ZIP	January 1994	Senior Officer's Legal Orientation Text, January 1994.
JA330.ZIP	January 1994	Nonjudicial Punishment Programmed Text, June 1993.
JA337.ZIP	October 1993	Crimes and Defenses Deskbook, July 1993.
JA4221.ZIP	April 1993	Op Law Handbook, Disk 1 of 5, April 1993.
JA4222.ZIP	April 1993	Op Law Handbook, Disk 2 of 5, April 1993.
JA4223.ZIP	April 1993	Op Law Handbook, Disk 3 of 5, April 1993.
JA4224.ZIP	April 1993	Op Law Handbook, Disk 4 of 5, April 1993.
JA4225.ZIP	April 1993	Op Law Handbook, Disk 5 of 5, April 1993.
JA501-1.ZIP	June 1993	TJAGSA Contract Law Deskbook, Volume 1, May 1993.
JA501-2.ZIP	June 1993	TJAGSA Contract Law Deskbook, Volume 2, May 1993.
JA505-11.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume I, Part 1, July 1994.
JA505-12.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume I, Part 2, July 1994.
JA505-13.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume I, Part 3, July 1994.
JA505-14.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume I, Part 4, July 1994.
JA505-21.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume II, Part 1, July 1994.

FILE NAME	UPLOADED	DESCRIPTION
JA505-22.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume II, Part 2, July 1994.
JA505-23.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume II, Part 3, July 1994.
JA505-24.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume II, Part 4, July 1994.
JA506-1.ZIP	November 1994	Fiscal Law Course Deskbook, Part 1, October 1994.
JA506-2.ZIP	November 1994	Fiscal Law Course Deskbook, Part 2, October 1994.
JA506-3.ZIP	November 1994	Fiscal Law Course Deskbook, Part 3, October 1994.
JA508-1.ZIP	April 1994	Government Materiel Acquisition Course Deskbook, Part 1, 1994.
JA508-2.ZIP	April 1994	Government Materiel Acquisition Course Deskbook, Part 2, 1994.
JA508-3.ZIP	April 1994	Government Materiel Acquisition Course Deskbook, Part 3, 1994.
1JA509-1.ZIP	November 1994	Federal Court and Board Litigation Course, Part 1, 1994.
1JA509-2.ZIP	November 1994	Federal Court and Board Litigation Course, Part 2, 1994.
1JA509-3.ZIP	November 1994	Federal Court and Board Litigation Course, Part 3, 1994.
1JA509-4.ZIP	November 1994	Federal Court and Board Litigation Course, Part 4, 1994.
JA509-1.ZIP	February 1994	Contract, Claims, Litigation and Remedies Course Deskbook, Part 1, 1993.
JA509-2.ZIP	February 1994	Contract Claims, Litigation, and Remedies Course Deskbook, Part 2, 1993.
JAGSCHL.WPF	March 1992	JAG School report to DSAT.
YIR93-1.ZIP	January 1994	Contract Law Division 1993 Year in Review, Part 1, 1994 Symposium.
YIR93-2.ZIP	January 1994	Contract Law Division 1993 Year in Review, Part 2, 1994 Symposium.
YIR93-3.ZIP	January 1994	Contract Law Division 1993 Year in Review, Part 3, 1994 Symposium.
YIR93-4.ZIP	January 1994	Contract Law Division 1993 Year in Review, Part 4, 1994 Symposium.
YIR93.ZIP	January 1994	Contract Law Division 1993 Year in Review text, 1994 Symposium.

f. Reserve and National Guard organizations without organic computer telecommunications capabilities, and individual mobilization augmentees (IMA) having bona fide military needs for these publications, may request computer diskettes containing the publications listed above from the appropriate proponent academic division (Administrative and Civil Law, Criminal Law, Contract Law, International and Operational Law, or Developments, Doctrine, and Literature) at The Judge Advocate General's School, Charlottesville, Virginia 22903-1781. Requests must be accompanied by one 5 1/4-inch or 3 1/2-inch blank, formatted diskette for each file. In addition, requests from IMAs must contain a statement which verifies that they need the requested publications for purposes related to their military practice of law.

g. Questions or suggestions on the availability of TJAGSA publications on the LAAWS BBS should be sent to The Judge Advocate General's School, Literature and Publications Office, ATTN: JAGS-DDL, Charlottesville, VA 22903-1781. For additional information concerning the LAAWS

BBS, contact the System Operator, SGT Kevin Proctor, Commercial (703) 806-5764, DSN 656-5764, or at the address in paragraph b(1)(h), above.

4. TJAGSA Information Management Items

a. Each member of the staff and faculty at The Judge Advocate General's School (TJAGSA) has access to the Defense Data Network (DDN) for electronic mail (e-mail). To pass information to someone at TJAGSA, or to obtain an e-mail address for someone at TJAGSA, a DDN user should send an e-mail message to:

"postmaster@jags2.jag.virginia.edu"

b. Personnel desiring to reach someone at TJAGSA via DSN should dial 934-7115 to get the TJAGSA receptionist; then ask for the extension of the office you wish to reach.

c. The Judge Advocate General's School also has a toll-free telephone number. To call TJAGSA, dial 1-800-552-3978.

5. Articles

The following information may be of use to judge advocates in performing their duties:

Elaine A. Carlson, Batson, J.E.B., *and Beyond: The Paradoxical Quest for Reasoned Peremptory Strikes in the Jury Selection Process*, 46 BAYLOR L. REV. 947 (1994).

Charles Robert Honts, *Assessing Children's Credibility: Scientific and Legal Issues in 1994*, 70 N.D. L. REV. 879 (1994).

6. The Army Law Library Service

With the closure and realignment of many Army installations, the Army Law Library System (ALLS) has become the point of contact for redistribution of materials contained in law libraries on those installations. *The Army Lawyer* will continue to publish lists of law library materials made available as a result of base closures. Law librarians having resources available for redistribution should contact Ms. Helena Daidone, JAGS-DDS, The Judge Advocate General's School, United States Army, Charlottesville, Virginia 22903-1781. Telephone numbers are DSN: 934-7115, ext. 394, commercial: (804) 972-6394, or facsimile: (804) 972-6386.

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